Customs Bulletin

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 172

(T.D. 87–51)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO REDUCTION OF PETITIONING TIME IN LIQUIDATED DAMAGES CASES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to expedite the processing of cases in which liquidated damages have been assessed against a bond holder for violations of the Customs laws and regulations. The time in which the principal under the bond may petition Customs for relief from the payment of liquidated damages is being reduced from 60 days to 30 days from the date of mailing of the notice of the liquidated damages incurred. It also provides that the surety will receive notice to pay the liquidated damages, if the principal fails to either timely file a petition or to pay or make arrangements to pay the liquidated damages. The notice will be sent to the surety within 10 days after the expiration of the principal's 30-day petitioning period or as soon thereafter as possible. The surety will then have an additional 30 days from the date of such notification to petition Customs for relief from the claim for liquidated damages. This change will expedite the processing of such cases and conform the administrative petitioning time in these cases to that which currently applies to seizure and forfeiture cases.

EFFECTIVE DATE: May 15, 1987.

FOR FURTHER INFORMATION CONTACT: Evelyn M. Suarez, Entry Procedures and Penalties Division (202–566–5746).

SUPPLEMENTARY INFORMATION:

Background

Section 172.2, Customs Regulations (19 CFR 172.2), provides procedures which are used when a petition for relief from a claim for

liquidated damages for violation of the conditions of a bond is not filed or when either payment is not made to Customs or arrangements are not made to pay by any party who is liable for the payment of liquidated damages assessed for violation of any of the conditions of the bond. Currently, § 172.2 allows for a 60-day period from the mailing date of the notice of liquidated damages incurred before any collection action is taken by Customs. However, collection action may be temporarily withheld if it appears that the party liable for the payment of liquidated damages is absent from the U.S. at the time the notice is received or for more than 30 days during the 60-day petitioning period.

Current § 172.12, Customs Regulations (19 CFR 172.12), refers to the 60-day period for filing a petition for relief in liquidated damages cases and current § 172.33, Customs Regulations (19 CFR 172.33), provides for a similar 60-day period for filing supplemental petitions for relief, under certain specified conditions.

Similar 60-day filing periods formerly applied to petitions for relief filed in accordance with the provisions of Parts 162 and 171, Customs Regulations (19 CFR Parts 162, 171), concerning cases involving the seizure of merchandise subject to forfeiture or fines and penalties incurred for violations of the Customs laws and regulations. Pursuant to T.D. 85–195, published in the Federal Register on December 10, 1985 (50 FR 50287), this 60-day petitioning period was reduced to 30 days. This reduction was done to conform Parts 162 and 171 to changes made to the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.),* with respect to the forfeiture and disposition of property seized by Customs. The petitioning period change was one of many changes to Parts 162 and 171, which resulted from certain provisions of the Comprehensive Crime Control Act of 1984 (Pub. L. 98–473) and the Tariff and Trade Act of 1984 (Pub. L. 98–573). It was expected that these changes would reduce Customs costs relating to the storage and upkeep of seized property and expedite the processing of penalty and forfeiture cases resulting from the seizure of the property.

At the time the changes to Parts 162 and 171 were proposed, it was determined advisable not to include liquidated damages cases among those subject to the new 30-day petitioning period. Inasmuch as seized property is not being held by Customs in liquidated damages cases, it was believed that the same urgency did not attach to these cases. It was subsequently decided, however, that liquidated damages cases should nevertheless be subject to a 30-day petitioning period in order to expedite the disposition of these cases, thereby saving Customs needed time and resources. It was also decided that having the same petitioning period for seizure, forfeiture, and liquidated damages cases would be easier to administer since it would preclude any confusion as to when the 30-day or the 60-day petitioning period would apply.

Accordingly, by notice published in the Federal Register on April 25, 1986 (51 FR 15637), it was proposed to amend §§ 172.2(a), 172.12(b), and 172.33(a)(1) and (c)(2)(ii), Customs Regulations, to reduce the petitioning time in liquidated damages cases from 60 days to 30 days. It was also proposed to amend § 172.2(b), to reduce from "more than 30 days" to "more than 20 days," the time during the 30-day petitioning period that a party liable for the payment of liquidated damages must be absent from the U.S. in order for collection action on the case to be temporarily withheld by Customs.

It was also proposed to amend § 172.2 to provide for the referral of unsatisfied liquidated damages claims to the Department of Justice rather than the U.S. Attorney. This direct referral to the Department of Justice would expedite the processing of these cases and is necessary inasmuch as cases involving unsatisfied liquidated damages claims are decided by the Court of International Trade rather than the local district courts before which the U.S. attorneys appear. In response to the notice, 48 comments were received. A discussion of these comments and our responses follows.

Discussion of Comments

Comment:

Most of the commenters oppose reducing the petition filing time from 60 days to 30 days in liquidated damages cases. They state that requiring a petitioner to formulate and submit a petition in so limited a time period would place a tremendous burden on the petitioner, and that it would be unfair and a denial of due process. They also claim that this change may deprive petitioners of the right to effective counsel since there would be insufficient time to retain counsel and for counsel to prepare and submit a petition.

They further claim that Customs delay in issuing liquidated damages claims makes research of pertinent issues and coordination of the information gathered extremely difficult to accomplish within 30 days. Information or documents vital to a petitioner's case may be located in other countries and acquisition of this evidence may take considerable time. Consequently, the proposed reduction would result either in a flurry of requests for an extension of the petitioning period or the submission of less complete, less thoughtful petitions.

Response:

Customs believes that in most liquidated damages cases, 30 days from the mailing date of the liquidated damages notice is a reasonable period of time for the principal to submit a petition. In most cases, the principal or importer has in its possession all the information necessary for the preparation of a petition and can be reasonably expected to submit a responsive petition within 30 days. However, Customs recognizes that in certain instances principals may require additional time to adequately respond to the liquidated

damages notice. Therefore, the same criteria for granting extensions which are currently in use for penalty and forfeiture cases in § 171.15, Customs Regulations (19 CFR 171.15), will be used for liquidated damages cases.

Comment:

The proposed change would be particularly detrimental to large corporations because the liquidated damages notice may take two or three weeks after its mailing date to be routed to the appropriate individual within the corporation. This delay would allow very little time to draft and file a petition.

Response:

The internal handling of mail within a corporation is not a matter over which Customs has control. It is the responsibility of the corporation to see that the liquidated damages notice is routed to the appropriate individual for timely response.

Comment:

Conforming the petitioning period in liquidated damages cases to that in seizure and penalty cases is inappropriate inasmuch as there is not the same concern in a liquidated damages case for urgent release and disposition of the merchandise since no merchandise is being held by Customs. The reduction of the petitioning period simply for "housekeeping" purposes at the expense of petitioners is unwarranted.

Response:

Although no seized merchandise is being held by Customs in liquidated damages cases, there are other valid considerations that warrant the reduction of the petitioning period. One is the expedition of the disposition of these cases, saving Customs time and resources that could be spent elsewhere. Another consideration is the avoidance of confusion as to when a 30-day or a 60-day petitioning period would apply since the same 30-day period would apply in seizure, penalty, and liquidated damages cases.

Comment:

Shortening the petitioning period in liquidated damages cases will not result in any faster disposition of the cases since most of the delays are attributable to Customs.

Response:

We disagree. Shortening the petitioning period will allow Customs to receive and act on these cases more quickly.

Comment:

The sureties claim that giving concurrent notice of the liquidated damages claim to them and the principal and then allowing only a 30-day petitioning period is a denial of due process since at the time the surety wrote the particular bond it assumed that there would be

a 60-day period in which to petition for relief. They also claim that concurrent filing periods are unfair since a surety generally has none of the relevant information available to it at the time it receives the notice, and therefore must use much more time to seek out information from Customs, the importer and its broker. Also, Customs often does not furnish the surety with sufficient documentation to fully investigate and properly handle such claims.

The sureties also contend that since over 90 percent of the liquidated damages claims are resolved by Customs and the principal without any involvement on the part of the surety, requiring the surety to investigate and prepare petitions in all cases is simply wasteful of its resources. They believe that there should be a separate and consecutive petitioning period for sureties, to allow them to devote their attention only to those cases in which there has not been a resolution of the claim.

For the above reasons, some of the commenters contend that the 60-day petitioning period for the principal and surety should be retained. One commenter also suggests that the surety should be notified by Customs within 10 days after expiration of the period for filing a petition by the principal and that the surety should be given an additional 60 days from the date of this notification to file its petition.

Response:

We agree that a large majority of liquidated damages cases are resolved by the bond principal without any need for involvement of the surety. We also agree that the surety generally does not have the information relating to the claim available to it at the time the notice of the claim is received.

For these reasons a separate petitioning period is warranted for the surety, to commence after it is notified of the expiration of the principal's 30-day petitioning period if no petition is filed, or the principal's failure to comply with Customs decision on the petition.

Accordingly, the proposal is being revised to include a separate, consecutive petitioning period for sureties. They will receive notification to pay the liquidated damages only if the bond principal has not complied with the notice of liquidated damages, within 10 days after either the expiration of the principal's 30-day petitioning period if no petition is filed or payment of the liquidated damages is not tendered, or if the principal fails to comply with Customs decision on the petition or as soon thereafter as possible. The surety will have an additional 30 days from the date of this notification to file a petition for relief.

Comment:

Customs should instruct the principal to file a copy of its petition with the surety, in order to eliminate unnecessary communication between Customs and the surety and to allow the surety to make early decisions in certain cases. It is also suggested that Customs at-

tach relevant documents, *e.g.*, bonds, entry papers and redelivery notices, to the notice of liquidated damages, to help speed up the response time of the sureties.

Response:

It is not Customs responsibility to instruct the principal to supply any document to its surety. That is a matter for these parties to resolve between themselves. Also, Customs does not have the time nor the resources to furnish the surety with copies of bonds, entry papers, etc. These documents should be furnished by the bond principal with whom the surety has entered into a contractual relationship. Also, one of the reasons for the surety's separate 30-day petitioning period is to allow it sufficient time to collect such documentation.

After consideration of all the comments and further review of the matter, we have decided to adopt the proposed amendments with the modification noted.

Further, an additional change is being made to Part 172 in this document. The reference to the U.S. attorney in § 172.23 is being removed and a reference to the Department of Justice is being inserted, to conform that section to the identical change being made to § 172.2.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 172

Administrative practice and procedures, Liquidated damages.

Amendments to the Regulations

Part 172, Customs Regulations (19 CFR Part 172), is amended as set forth below:

PART 172—LIQUIDATED DAMAGES

1. The authority citation for Part 172 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 172.2 is revised to read as follows:

§ 172.2 Failure to petition for relief.

(a) *Referral of claim to Department of Justice.* If any party liable for liquidated damages fails to petition for relief or to pay or make arrangements to pay the liquidated damages within 30 days from the date of mailing of the notice of the liquidated damages incurred, as provided in § 172.1 (except for sureties who are provided a separate petitioning period under § 172.12(b)), or within such additional time as may have been granted, the district director shall promptly refer the claim to the Department of Justice.

(b) *Absence from the U.S.* If it appears that the parties liable for liquidated damages are absent from the U.S. or were absent for more than 20 days during the 30-day period referred to in paragraph (a) of this section, the district director may withhold such referral for a reasonable time unless other action is expressly authorized by the Commissioner of Customs.

3. Section 172.12(b) is revised to read as follows:

§ 172.12 Filing of petition for relief.

* * * * * * *

(b) *When filed.*

(1) Except with respect to sureties, a petition for relief shall be filed within 30 days from the date of mailing of the notice of the liability for liquidated damages incurred unless an extension of such period has been granted by the district director.

(2) The surety will receive notice to pay the liquidated damages if the principal fails to either timely file a petition or to pay or make arrangements to pay the liquidated damages. The notice will be sent to the surety within 10 days after the expiration of the principals 30-day petitioning period or as soon thereafter as possible. The surety will then have an additional 30 days from the date of this notification to file its own petition for relief.

4. Section 172.23 is amended by removing the words "U.S. attorney," and by inserting, in their place, the words "Department of Justice."

5. Section 172.33 is amended by revising paragraphs (a)(1) and (c)(2)(ii) to read as follows:

§ 172.33 Supplemental petitions for relief.

(a) *Time and place of filing.* If the interested parties are not satisfied with a decision of the district director or the Commissioner of Customs, a supplemental petition may be filed with the district director by the interested parties. Such a petition shall be filed either:

(1) Within 30 days from the date of notice to the petitioner of the decision from which further relief is requested if no effective period is prescribed in the decision: or

* * * * * * *

(c) * * *

(1) * * *

(2) A second supplemental petition will not be considered except in one of the following circumstances:

(i) * * *

(ii) If it is filed within 30 days following an administrative or judicial decision which reduces the loss of duties upon which the mitigated penalty amount was based; or

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 24, 1987.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 15, 1987 (52 FR 12149)]

(T.D. 87–52)

QUARTERLY RATES OF EXCHANGE

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: April 1, 1987 through June 30, 1987.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.705700
Austria	Schilling	0.078003
Belgium	Franc	0.026525
Brazil	Cruzado	N/A
Canada	Dollar	0.763534
China, P.R.	Renimbi yuan	0.267996
Denmark	Krone	0.145412
Finland	Markka	0.223889
France	Franc	0.164989
Germany	Deutsche mark	0.549089
Hong Kong	Dollar	0.128148
India	Rupee	0.077280
Iran	Rial	N/A
Ireland	Pound	1.468000

Country	Name of currency	U.S. dollars
Italy	Lira	0.000770
Japan	Yen	0.006811
Malaysia	Dollar	0.398248
Mexico	Peso	N/A
Netherlands	Guilder	0.486145
New Zealand	Dollar	0.570500
Norway	Krone	0.145815
Philippines	Peso	N/A
Portugal	Escudo	0.007090
Republic of South Africa	Rand	0.490000
Singapore	Dollar	0.467399
Spain	Peseta	0.007828
Sri Lanka	Rupee	0.034698
Sweden	Krona	0.157233
Switzerland	Franc	0.657246
Thailand	Baht (tical)	0.038805
United Kingdom	Pound	1.602000
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–53)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 2, 1987	$.007427
March 3, 1987	.007440
March 4, 1987	.007432
March 5, 1987	.007402
March 6, 1987	.007062
South Korea won:	
March 2, 1987	.001165
March 3–6, 1987	.001164

Taiwan N.T. dollar:	
March 2, 1987	.028539
March 3, 1987	.028514
March 4, 1987	.028523
March 5, 1987	N/A
March 6, 1987	.028580

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-54)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 9, 1987	$.007361
March 10, 1987	.007377
March 11, 1987	.007299
March 12, 1987	.007353
March 13, 1987	.007386
South Korea won:	
March 9-13, 1987	.001165
Taiwan N.T. dollar:	
March 9, 1987	.028612
March 10, 1987	.028694
March 11, 1987	.028744
March 12, 1987	.028777
March 13, 1987	.028810

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–55)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 16, 1987	$.007424
March 17, 1987	.007418
March 18, 1987	.007413
March 19, 1987	.007429
March 20, 1987	.007418
South Korea won:	
March 16, 1987	.001166
March 17, 1987	.001167
March 18, 1987	.001169
March 19, 1987	.001168
March 20, 1987	.001170
Taiwan N.T. dollar:	
March 16, 1987	.028868
March 17, 1987	.028893
March 18, 1987	.028910
March 19, 1987	.028944
March 20, 1987	.028969

(LIQ–03–01 S:COM CIE)

Dated: April 2, 1987.

Angela DeGaetano,
Chief,
Customs Information Exchange.

(T.D. 87–56)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and

others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 23, 1987	$.007471
March 24, 1987	.007485
March 25, 1987	.007446
March 26, 1987	.007439
March 27, 1987	.007471
South Korea won:	
March 23, 1987	.001171
March 24, 1987	.001172
March 25–27, 1987	.001173
Taiwan N.T. dollar:	
March 23, 1987	.029028
March 24, 1987	.029044
March 25, 1987	.029061
March 26, 1987	.029087
March 27, 1987	.029112

(LIQ–03–01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–57)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 30, 1987	$.007541
March 31, 1987	.007516
South Korea won:	
March 30, 1987	.001174
March 31, 1987	.001175

Taiwan N.T. dollar:	
March 30, 1987	N/A
March 31, 1987	.029146

(LIQ–03–01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–58)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Belgium franc:	
March 2, 1987	$.026364
March 3, 1987	.026330
March 5, 1987	.026350
Brazil cruzado:	
March 2, 1987	N/A
March 3, 1987	.050518
March 4, 1987	N/A
March 5, 1987	.049950
March 6, 1987	.050659
Denmark krone:	
March 2, 1987	.144896
March 3, 1987	.144718
March 4, 1987	.144509
March 5, 1987	.145033
Finland markka:	
March 5, 1987	.221484

New Zealand dollar:	
March 2, 1987	.56350
March 3, 1987	.56050
March 4, 1987	.56420
March 5, 1987	.55800
March 6, 1987	.55650
Norway krone:	
March 2, 1987	.143164
March 3, 1987	.143225
March 4, 1987	.143472
March 5, 1987	.143988
March 6, 1987	.143678
United Kingdom pound:	
March 5, 1987	1.5778
March 6, 1987	1.5890

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-59)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzado:	
March 9, 1987	$.050505
March 10, 1987	.049383
March 11, 1987	.048780
March 12, 1987	.048473
March 13, 1987	.048239

New Zealand dollar:	
March 9, 1987	.56370
March 10, 1987	.56700
March 11, 1987	.56950
March 12, 1987	.57200
March 13, 1987	.55500
Norway krone:	
March 9, 1987	.143266
March 12, 1987	.143164
March 13, 1987	.143410
United Kingdom pound:	
March 9, 1987	1.5880
March 10, 1987	1.5842
March 11, 1987	1.5910
March 12, 1987	1.5885
March 13, 1987	1.5750

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-60)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Belgium franc:	
March 20, 1987	$.026323
Brazil cruzado:	
March 16, 1987	.048047
March 17, 1987	.047801
March 18, 1987	.047529
March 19, 1987	.047259
March 20, 1987	N/A

Canada dollar:	
March 20, 1987	.764059
Denmark krone:	
March 16, 1987	.144456
March 17, 1987	.144477
March 18, 1987	.144613
March 19, 1987	.144613
March 20, 1987	.144865
Finland markka:	
March 16, 1987	.221190
March 17, 1987	.221533
March 18, 1987	.221877
March 19, 1987	.221852
March 20, 1987	.222222
New Zealand dollar:	
March 16, 1987	.56300
March 17, 1987	.56650
March 18, 1987	.56550
March 19, 1987	.55950
March 20, 1987	.55680
Norway krone:	
March 16, 1987	.143968
March 17, 1987	.143637
March 18, 1987	.144009
March 19, 1987	.144196
March 20, 1987	.144259
Sweden krona:	
March 18, 1987	.155860
March 19, 1987	.155885
March 20, 1987	.156043
United Kingdom pound:	
March 16, 1987	1.5830
March 17, 1987	1.5975
March 18, 1987	1.6058
March 19, 1987	1.6033
March 20, 1987	1.6022

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–61)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 23, 1987	$.078156
March 24, 1987	.078064
March 25, 1987	.077851
March 26, 1987	.077882
March 27, 1987	.078034
Belgium franc:	
March 23, 1987	.026504
March 24, 1987	.026476
March 25, 1987	.026420
March 26, 1987	.026413
March 27, 1987	.026476
Brazil cruzado:	
March 23–27, 1987	N/A
Canada dollar:	
March 23, 1987	.764234
March 24, 1987	.764643
March 25, 1987	.762544
March 26, 1987	.764234
March 27, 1987	.765404
Denmark krone:	
March 23, 1987	.145815
March 24, 1987	.145815
March 25, 1987	.145075
March 26, 1987	.145043
March 27, 1987	.145201
Finland markka:	
March 23, 1987	$.223864
March 24, 1987	.223764
March 25, 1987	.223164
March 26, 1987	.222717
March 27, 1987	.223214

Germany deutsche mark:	
March 23, 1987	.549239
March 24, 1987	.548847
March 25, 1987	.547495
March 27, 1987	.548396
Japan yen:	
March 23, 1987	.006656
March 24, 1987	.006697
March 25, 1987	.006705
March 26, 1987	.006702
March 27, 1987	.006770
Netherlands guilder:	
March 23, 1987	.486263
March 24, 1987	.485767
March 25, 1987	.484966
March 27, 1987	.485791
New Zealand dollar:	
March 23, 1987	.55850
March 24, 1987	.56320
March 25, 1987	.56700
March 26, 1987	.56400
March 27, 1987	.56420
Norway krone:	
March 23, 1987	.145444
March 24, 1987	.145296
March 25, 1987	.145085
March 26, 1987	.145138
March 27, 1987	.145666
Republic of South Africa rand:	
March 25, 1987	$.48750
March 26, 1987	.48650
March 27, 1987	.49000
Sweden krona:	
March 23, 1987	.157011
March 24, 1987	.156961
March 25, 1987	.156568
March 26, 1987	.156544
March 27, 1987	.157109
Switzerland franc:	
March 23, 1987	.656383
March 24, 1987	.656383
March 25, 1987	.655824
March 26, 1987	.654879
March 27, 1987	.657895

United Kingdom pound:	
March 23, 1987	1.6170
March 24, 1987	1.6100
March 25, 1987	1.6058
March 26, 1987	1.6060
March 27, 1987	1.6030

(LIQ–03–01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–62)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
March 30, 1987	$.70250
March 31, 1987	.70450
Austria schilling:	
March 30, 1987	.078802
March 31, 1987	.078864
Belgium franc:	
March 30, 1987	.026788
March 31, 1987	.026759
Brazil cruzado:	
March 30–31, 1987	N/A
Canada dollar:	
March 30, 1987	.764117
March 31, 1987	.766107
Denmark krone:	
March 30, 1987	.146606
March 31, 1987	.146520

Finland markka:	
March 30, 1987	.225327
March 31, 1987	.225479
France franc:	
March 30, 1987	.166459
March 31, 1987	.166667
Germany deutsche mark:	
March 30, 1987	.554539
March 31, 1987	.554939
Japan yen:	
March 30, 1987	.006831
March 31, 1987	.006864
Netherlands guilder:	
March 30, 1987	.491111
March 31, 1987	.491280
New Zealand dollar:	
March 30, 1987	.56550
March 31, 1987	.56970
Norway krone:	
March 30, 1987	.146767
March 31, 1987	.146735
Republic of South Africa rand:	
March 30, 1987	.49750
March 31, 1987	.49500
Sweden krona:	
March 30, 1987	.158203
March 31, 1987	.158103
Switzerland franc:	
March 30, 1987	.663570
March 31, 1987	.664231
United Kingdom pound:	
March 30, 1987	1.6075
March 31, 1987	1.6070

(LIQ-03-01 S:COM CIE)

Dated: April 2, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

19 CFR Part 148

(T.D. 86–118)

CONFORMING AMENDMENTS TO THE CUSTOMS REGULATIONS; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In FR Doc. 86–13984, published as T.D. 86–118 on June 20, 1986 (51 FR 22513), numerous changes were made to sections of the Customs Regulations to conform to various executive, legislative, and administrative actions. Amendments concerning the personal exemptions available to returning residents were inaccurately revised, and some examples showing how to calculate duty owed were not revised in accord with the new exemption levels. This document corrects those inaccuracies.

EFFECTIVE DATE: April 15, 1987.

FOR FURTHER INFORMATION CONTACT: Samuel McLinn, Air Passenger Program Manager (566–5607).

SUPPLEMENTARY INFORMATION:

BACKGROUND

T.D. 86–118, published in the Federal Register on June 20, 1986 (51 FR 22513), included conforming amendments to § 148.101, Customs Regulations (19 CFR 148.101), to account for the changes in personal exemptions allowed residents returning to the U.S. from American Somoa, Guam, the U.S. Virgin Islands, or elsewhere. However, the amendments did not include new figures to be used in the examples provided in that section nor was the change in the flat rate of duty on noncommercial importations, formerly 10% of $600 worth of articles imported for personal or household use, or as bona fide gifts, now 10% of $1000 worth of such articles, pursuant to item 869.00, Tariff Schedules of the United States (19 U.S.C. 1202), included.

To correct these omissions, § 148.101 is further amended in the following manner:

1. In the introductory text to the section, the figure "$800" is removed from the three places it appears and "$1,000" is inserted in its place.

2. In "Example 1", the figure "$1,050" is removed and "$1,950" is inserted in its place, the figure "$300" is removed and "$400" is inserted in its place, and the table is amended to read as follows:

		Fair retail value	Duty
(a)	The $400 personal exemption	$ 400	——
(b)	Articles which have a free rate of duty	100	——
(c)	The $1,000 flat rate of duty calculated at 10 percent	1,000	$100
(d)	Balance of articles subject to duty at rates other than the flat rate	450[1]	1
	Total	$1,950[1]	1

3. In "Example 2", the figure "$2,900" is removed and "$4,100" is inserted in its place, the figure "$600" is removed and "$800" is inserted in its place, and the table is revised to read as follows:

		Fair retail value	Duty
(a)	The $800 personal exemptions for residents returning from the Virgin Islands are grouped for a total of	$1,600	——
(b)	Articles which carry a free rate of duty	100	——
(c)	The $1,000 flat rate of duty allowances calculated at 5 percent for persons arriving from the Virgin Islands are grouped for a total of	2,000	$100
(d)	Balance of articles subject to duty at rates other than flat rates of duty	400[1]	1
	Total	$4,100[1]	1

Date: April 8, 1987.

B. JAMES FRITZ,
Director, Regulations Control
and Disclosure Law Division.

[Published in the Federal Register, April 15, 1987 (52 FR 12149))]

[1] (1) The articles not covered by exemptions, allowances, and duty-free rates will be valued under sec. 402 or 402(a), Tariff Act of 1930, as amended, and duty calculated at rates other than the flat rates.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87-27)

TOHO TITANIUM CO., LTD., PLAINTIFF *v.* UNITED STATES, THE U.S. DEPARTMENT OF COMMERCE, AND THE U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND RMI CO. AND TITANIUM METALS CORP. OF AMERICA, INTERVENORS

Court No. 85-1-00024

Before DICARLO, *Judge.*

Plaintiff challenges the final determination of sales at less than fair value by the United States Department of Commerce, International Trade Administration (Commerce) in its investigation of titanium sponge from Japan, asserting Commerce erred in its determination to use constructed value rather than sales of titanium sponge in Japan as the basis for determining foreign market value. Commerce must use sales in the home market unless it determines pursuant to section 773(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (1982) that home market sales have been made at a price less than the cost of production (1) in substantial quantities over an extended period of time and (2) at prices which will not permit recovery of all costs within a reasonable period of time in the normal course of trade. Plaintiff claims that Commerce did not make the requisite determinations, and even if it did that such determinations are not supported by substantial evidence on the record.

Held: Commerce made the determinations required by section 1677b(b). The determination that substantial quantities of below cost sales were made over an extended period of time is supported by substantial evidence on the record. The action is remanded so Commerce may explain why plaintiff's sales below the cost of production are not at prices which would allow recovery of all costs in a reasonable period of time in the normal course of trade.

[The action is remanded.]

(Decided March 13, 1987)

Graham & James (Denis H. Oyakawa, James H. Broderick, Jr. and *Patrick J. Fields)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Sheila N. Ziff*); *Lisa B. Koteen,* Office of the Deputy Chief Counsel for Import Administration, for defendant.

Wilmer, Cutler & Pickering (A. Douglas Melamed, John D. Greenwald and *Deborah M. Levy); John F. Hornbostel, Jr.,* RMI Company, for intervenors RMI Company

Pillsbury, Madison & Sutro (Donald E. deKieffer and *Francis J. Sailer); Frederick W. Steinberg,* Titanium Metals Corporation of America, for intervenor Titanium Metals Corporation of America.

DiCARLO, *Judge:* Toho Titanium Company, Ltd. (Toho), a Japanese exporter of titanium sponge, challenges a final determination by the United States Department of Commerce, International Trade Administration (Commerce) that titanium sponge from Japan is being sold in the United States at less than fair value. *Titanium Sponge From Japan: Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 38,687 (October 1, 1984). Pursuant to Rule 56.1 of the rules of this Court, Toho moves for a judgment upon the agency record, asserting Commerce erred in its determination to use constructed value rather than sales of titanium sponge in Japan as the basis for determining foreign market value. The action is remanded for an explanation by Commerce why Toho's sales below the cost of production are not at prices which would allow recovery of all costs within a reasonable period of time in the normal course of trade.

BACKGROUND

On November 28, 1983, the RMI Company (RMI) filed an antidumping petition with Commerce on behalf of the United States titanium sponge industry. The petition alleged that imports of titanium sponge from Japan were being, or were likely to be, sold in the United States at less than fair value and that such imports were materially injuring or threatening to materially injure the United States titanium sponge industry. The petition further alleged that sales of titanium sponge in the home market of Japan were being made at less than the cost of production. After evaluation of the petition, Commerce decided to initiate an antidumping investigation and published notice of such decision. *See Titanium Sponge From Japan; Initiation of Antidumping Investigation,* 48 Fed. Reg. 56,815 (December 23, 1983).

On December 30, 1983, Commerce presented antidumping questionnaires to the three known Japanese producers and exporters of titanium sponge—Nippon Soda Co., Osaka Titanium Co., Ltd. and Toho. The questionnaires requested data respecting sales and production costs for a six-month period covering June 1, 1983 to November 30, 1983.

Based on the questionnaire responses, Commerce made a preliminary determination that Japanese titanium sponge was being sold, or was likely to be sold, at less than fair value in the United States. *Preliminary Determination of Sales at Less Than Fair Value; Titanium Sponge From Japan,* 49 Fed. Reg. 20,042 (May 11, 1984). In that preliminary determination, Commerce stated with respect to the determination of foreign market value:

> In accordance with section 773(a)(1) of the Act, we used home market prices or constructed value to determine foreign market

> value. The petitioner alleged that sales in the home market were at prices below the cost of producing titanium sponge. In order to determine the cost of production, we examined production costs, including materials, labor and general expenses.
>
> Where sales of merchandise under investigation were made over an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time in the normal course of trade, we disregarded these sales in our analysis in accordance with section 773(b) of the Act. Where sufficient sales of the merchandise under investigation were made at or above the cost of production, we used them in making price-to-price comparisons with sales in the U.S. market. Where sales of the merchandise under investigation above the cost of production were inadequate to provide a basis for foreign market value, we used constructed value to determine foreign market value.
>
> * * * * * * *
>
> We compared Toho's home market sales to its cost of production. We found that all sales were made at less than cost. Therefore, we used constructed value as the basis of foreign market value. We found that all U.S. sales were made at less than the constructed value.

49 Fed. Reg. at 20,042–43.

In its prehearing brief, Toho argued that six months did not constitute "an extended period of time" of below costs sales for the titanium sponge industry and that six months is an insufficient period for collecting data to determine what is "an extended period of time" or whether Toho's prices would allow recovery of costs "over a reasonable period of time," as required by section 773(b) of the Tariff Act of 1930 (the Act), as amended, 19 U.S.C. § 1677b(b) (1982). Toho requested that Commerce used actual home market sales prices to calculate foreign market value or, alternatively, to determine whether Toho's prices would permit recovery of all costs over the company's business cycle.

At the hearing on July 25, 1984 and in its posthearing brief, Toho again requested that Commerce assess whether Toho's prices would permit recovery of all costs over the company's business cycle. In response to a letter sent by Toho dated August 21, 1984, Commerce replied by letter dated September 24, 1984 that it would not consider Toho's position both because the argument was made too late in the investigation to allow verification or comment and because the data submitted by Toho was inadequate to support its position.

In its final determination, Commerce stated:

> In accordance with section 773(a)(2) of the Act, we used constructed value to determine foreign market value. The petitioner alleged that sales in the home market were at prices below the cost of producing titanium sponge. In order to determine the cost of production, we examined production costs, including materials, labor and general expenses.

> We found that all non-U.S. sales of the merchandise under investigation were made over an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time in the normal course of trade. Therefore, we disregarded these sales in our analysis in accordance with section 773(b) of the Act. Instead, we used constructed value to determine foreign market value.

49 Fed. Reg. at 38,688.

Commerce also responded to Toho's position concerning the use of constructed value rather than home market sales:

> Comment 1: Toho asserts that the Department must determine that its home market sales at less than the cost of production (1) have been made over an extended period of time and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade, pursuant to section 773(b) of the Act. Toho argues that the six-month period which the Department examined is not an "extended period of time" nor a "reasonable period" within the meaning of the Act.
>
> DOC Position: Toho submitted the company's plant utilization data for 10 years to support its allegation that the titanium sponge industry was in a trough in its business cycle during the period of investigation and that Toho's prices would allow recovery of all costs over a "reasonable period of time," were that period to include an entire business cycle. The adjustment was not considered by the Department because the information (1) did not justify Toho's position that its prices would recover all costs over a "reasonable period of time," and (2) was not submitted in a timely manner.

49 Fed. Reg. at 38,691.

On November 30, 1984, Commerce published an antidumping duty order regarding titanium sponge from Japan, imposing a required cash deposit of estimated antidumping duties of 34.25 percent on entries of titanium sponge manufactured by Toho. *See* 49 Fed. Reg. 47,053 (1984). Toho timely brought this action to contest that final order. The Court granted motions to intervene by RMI and Titanium Metals Corporation of America.

OPINION

In its motion for judgment upon the agency record, Toho is seeking a review of an antidumping duty order under section 516A(a)(2) of the Act, as amended, 19 U.S.C. § 1516a(a)(2) (1982). The standard of review of such action by the Court is set forth in 19 U.S.C. § 1516a(b)(1)(B) which states that "[T]he court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law."

Toho argues that Commerce must use sales in the home market, Japan, to calculate foreign market value unless it determines pur-

suant to section 773(b) of the Act, as amended, 19 U.S.C. § 1677b(b) (1982) that home market sales have been made at a price less than the cost of production over an extended period of time in substantial quantities and at prices which will not permit recovery of all costs within a reasonable period of time in the normal course of trade. Toho claims that Commerce did not make these determinations, and even if such determinations were made they are not supported by substantial evidence on the record.

The relevant portion of section 1677b(b) states:

> If the administering authority determines that sales made at less than cost of production—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,
>
> such sales shall be disregarded in the determination of foreign market value.

19 U.S.C. § 1677b(b) (1982).

In both the preliminary and final determinations, Commerce states, albeit in a conclusionary fashion, that these two determinations were made:

> Where sales of merchandise under investigation were made over an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time in the normal course of trade, we disregarded these sales in our analysis in accordance with section 773(b) of the Act. Where sufficient sales of the merchandise under investigation above the cost of production were inadequate to provide a basis for foreign market value, we used constructed value to determine foreign market value.
>
> * * * * * * *
>
> We compared Toho's home market sales to its cost of production. We found that all sales were made at less than cost. Therefore, we used constructed value as the basis of foreign market value. We found that all U.S. sales were made at less than the constructed value.

49 Fed. Reg. at 20,042 (preliminary determination).

> We found that all non-U.S. sales of the merchandise under investigation were made over an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time in the normal course of trade. Therefore, we disregarded these sales in our analysis in accordance with section 773(b) of the Act. Instead, we used constructed value to determine foreign market value.

49 Fed. Reg. at 38,688 (final determination).

Despite the result-oriented manner in which Commerce conveyed its determinations concerning these two requirements of section

1677b(b), the Court cannot say that the determinations were not made by Commerce. The sufficiency of Commerce's explanation of its reasoning underlying the determinations is discussed later in assessing whether the determinations are supported by substantial evidence on the record.

Commerce made its determinations with respect to these two aspects of section 1677b(b) based upon questionnaire responses that provided data covering a six-month period. Toho argues first that Commerce only chose a six-month period for investigation because it is the standard response time for any investigation. Even if true, this does not mean that data from a six-month period is insubstantial evidence on the record to support Commerce's determinations.

Commerce has implemented a regulation which provides a framework for all its cost of production and sales investigations:

> (a) Upon publication of the notice of "Initiation of Anti-dumping Investigation," the Secretary shall proceed promptly to obtain such information as may be necessary for preliminary and final determinations of sales at less than fair value. The Secretary normally will examine at least 60 percent of the dollar volume of exports to the United States from any country subject to an antidumping investigation. Ordinarily the Secretary will require a foreign manufacturer, producer, or exporter subject to the investigation to submit pricing information covering a period of at least 150 days prior to, and 30 days after, the first day of the month during which the petition was received in acceptable form. The Secretary may, however, require the submission of pricing information for such other period as he deems necessary and he may also require the submission of pricing information on a current basis during the course of an investigation. Where appropriate, cost information also will be required.

19 C.F.R. § 353.38(a) (1983). The regulation does provide that an investigation ordinarily covers approximately six-months, but gives the Secretary discretion to collect sales and cost information for a longer or shorter period of time as he deems necessary.

The Court finds that on its face the regulation does not contravene section 1677b(b). In evaluating Commerce's practice pursuant to the regulation, the Court must look at each case independently to assess whether the evidence produced during the investigation provides substantial evidence on the record to support the determinations required by statute.

Toho argues that data collected over a six-month period of time is insufficient evidence for Commerce to determine that sales below the cost of production have been made for an extended period of time in the titanium sponge industry. Toho asserts that Congress intended that the determination of what is an extended period of time be based upon an examination of the business conditions of the relevant industry and that a six-month "snapshot" of the highly cyclical and capital intensive titanium sponge industry during a trough in the industry's business cycle circumvents that intent.

Congress did not provide a specified time period in section 1677b(b). While the absence of a standard period of time indicates that such determination should be made after review of the particular industry under investigation, nothing in the statute or legislative history requires Commerce to adopt a business cycle analysis in its investigation of the relevant industry before making its determination.

The legislative history of section 205(b) of the Trade Act of 1974, the predecessor to section 1677b(b), indicates that Congress sought to disallow home market sales in determining foreign market value only where such sales were "uniformly made at less than the cost of production." Congress did not expect below costs sales to be disregarded in every instance, especially if there were sufficient numbers of above costs sales and the sales at below cost of production resulted from unique circumstances such as the necessity "to sell obsolete or end-of-model year merchandise at less than cost." Essentially, Congress requires that when home market sales below cost of production are made in substantial quantities and over an extended period of time then home market sales should be disregarded, but that when such home market below costs sales are infrequent, home market sales should not be disregarded. *See* S. Rep. No. 1298, 93rd Cong., 2d Sess. 173 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7310; H.R. Rep. No. 571, 93rd Cong., 2d Sess. 71 (1973).

In the present action, verified confidential responses to the questionnaires sent by Commerce to Toho and the other Japanese titanium sponge manufacturers reveal that home market sales below the cost of production were made frequently as opposed to infrequently. Toho does not deny that it made substantial quantities of below cost of production sales in each of the months investigated.

The Court finds that the concern of Congress that sales in the home market not be disregarded if sales below cost of production occurred only sporadically or resulted from a typical, brief business practice is allayed in this case. The Court holds that there is substantial evidence on the record supporting Commerce's determination that below cost of production sales were made over an extended period of time and in substantial quantities for the Japanese titanium sponge industry.

The next question concerns Commerce's determination that the prices of sponge sold below cost of production will not permit recovery of all costs within a reasonable period of time. Although Commerce found all sales by Toho during a six-month period were at prices below the cost of production, Commerce does not explain why Toho will not be able to recoup its costs from sales at the prices charged over a reasonable period of time in the normal course of trade. An explanation on the record discussing this determination is necessary for the Court to conduct a proper judicial review. *See*

Southwest Florida Winter Vegetable Growers Ass'n v. *United States*, 7 CIT 99, 103–05, 584 F. Supp. 10, 15–16 (1984).

Central to a proper determination by Commerce is some discussion on the record as to why the prices charged on sales by Toho will not allow recovery of its costs in a reasonable period of time. For example, if there is no change in Toho's cost of production then future sales at the prices charged during the investigatory period below cost logically could never recover all costs. If the cost of production declines in the future below the investigatory prices, however, then such prices may allow recoupment of all costs at some future date, and Commerce must determine whether the time necessary for complete recoupment is a "reasonable period of time in the normal course of trade" under section 1677b(b).

Toho says that Commerce cannot properly make a determination whether costs will be recovered within a reasonable period of time using only a six-month "snapshot" of the Japanese titanium sponge industry. Toho argues that an investigation of its entire business cycle would reveal that it could recoup its losses even at the prices charged below cost of production during the investigatory period and that its business cycle is a reasonable period of time for recovery of all costs, especially since the titanium sponge industry is highly capital intensive and cyclical.

Section 1677b(b) does not state that a business cycle analysis be made of a particular company in determining whether costs will be recovered within a reasonable period of time in the normal course of trade. Nor does the legislative history indicate that Congress requires a company's business cycle be evaluated in determining what would be a reasonable period of time for such recoupment.

The legislative history of section 205(b) of the Trade Act of 1974 does indicate that Commerce should evaluate the sales of certain products, such as commercial aircraft, which "typically require large research and development costs which could not reasonably be recovered in the first year or two of sales." Congress states that such guidance is offered so that "sales at prices which will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time would not be disregarded" in determining foreign market value. *See* S. Rep. No. 1298 at 173, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 7310; H. R. Rep. No. 571 at 71. This shows Congress intended that the prices charged below cost of production should be analyzed to determine whether such prices will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time in the normal course of trade.

The Court finds that Commerce must evaluate the prices charged by Toho during the investigatory period in relation to projected cost of production and anticipated future sales in determining whether such prices will allow recovery of all costs in a reasonable period of time in the normal course of trade and that Commerce may rely on data covering only a six-month period in making the determination.

The action is remanded for Commerce to explain its determination, so the Court can properly review whether the evidence on the record supports the analysis.

Commerce shall file with the Court within 30 days its explanation regarding the determination that Toho's prices on sales below the cost of production will not allow recovery of all costs within a reasonable period of time in the normal course of trade. Plaintiff shall file any comments on the results of the remand within 15 days after the filing of Commerce's explanation, and defendant shall respond within 10 days after the filing of plaintiff's comments.

So ordered.

(Slip Op. 87–28)

CARLISLE TIRE & RUBBER CO., DIVISION OF CARLISLE CORP. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, DONG-AH TIRE IND. CO., LTD., HEUNG-AH TIRE IND. CO., LTD. DEFENDANT-INTERVENORS

Court No. 84–07–01058

Before DiCARLO, *Judge.*

The Court remanded the negative dumping determination in *Tubes for Tires, Other Than Bicycle Tires, From the Republic of Korea,* 49 Fed. Reg. 26,780 (1984), to the United States Department of Commerce (Commerce), for recalculations required by Commerce's use of inconsistent sets of tube weights in making merchandise adjustments under 19 U.S.C. § 1677b(a)(4) (1982) and drawback adjustments under 19 U.S.C. § 1677a(d)(1)(B) (1982). On remand Commerce based both adjustments on the weights used for making merchandise adjustments, which were verified by weighing sample tubes.

Held: Commerce's method of recalculating adjustments for drawback is consistent with the remand order. Commerce's negative dumping determination, based on margins of 0.03% for Heung-Ah Tire Ind. Co., Ltd. and 0.017% for Dong-Ah Tire Ind. Co., Ltd. is supported by substantial evidence and in accordance with law.

[The action is dismissed.]

(Decided March 16, 1987)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nisley),* for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(Sheila N. Ziff)* for defendant.

Dow, Lohnes & Albertson (William Silverman, John C. Jost, and *Margaret B. Dardess),* for defendant-intervenor Dong-Ah Tire Ind. Co., Inc.

Arnold & Porter (Richard A. Johnson and *Stephan E. Becker),* for defendant-intervenor Heung-Ah Tire Ind. Co., Inc.

MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge:* Plaintiffs, representing domestic producers of tire tubes, brought this action challenging the final negative dumping determination in *Tubes For Tires, Other Than Bicycle Tires, From the Republic of Korea,* 49 Fed. Reg. 26,780 (1984). The action was remanded to the Department of Commerce, International Trade Ad-

ministration (Commerce) for recalculations in view of the Court's finding that merchandise adjustments under 19 U.S.C. § 1677b(a)(4) (1982) and drawback adjustments under 19 U.S.C. § 1677a(d)(1)(B) (1982) were made on the basis of inconsistent sets of tire tube weights. *Carlisle Tire & Rubber Co.* v. *United States,* 10 CIT ——, 634 F. Supp. 419 (1986). Specifically, the weights used for the merchandise adjustments were determined by randomly weighing sample tubes, while the generally higher weights used to determine drawback adjustments were reportedly taken from Korean packing lists which accompanied shipments of exported tubes. The remand order directed that Commerce either disregard the drawback adjustment entirely, or make both adjustments using a consistent set of weights. The Court previously held that merchandise weights verified by weighing sample tubes were supported by substantial evidence and in accordance with law. *See Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT ——, ——, 622 F. Supp. 1070, 1082 (1985).

On remand Commerce chose to retain the drawback adjustments and to use the verified merchandise weights to make both adjustments. Commerce found that the drawback adjustment for Dong-Ah Tire Ind. Co., Ltd. (Dong-Ah) had been calculated using the weights specified on packing lists attached to Dong-Ah's drawback applications. Commerce therefore performed recalculations and reported a slight increase in the dumping margin for Dong-Ah. For Hueng-Ah Tire Ind. Co., Ltd. (Heung-Ah), Commerce found that the drawback adjustment had originally been based on the merchandise adjustment weights, and that no recalculations were necessary. *Determination of the Tube Weights Used to Calculate Duty Drawback Pursuant to Court Remand* (April 29, 1986) *(Remand Determination)* at 2.

After reviewing Commerce's recalculations for Dong-Ah, the Court found that Commerce had not complied with the remand instructions. The statute authorizes a drawback adjustment in "the amount of any import duties imposed by the country of exportation which have been rebated, * * * by reason of the exportation of the merchandise to the United States." 19 U.S.C. § 1677a(d)(1)(B) (1982). The statute does not authorize an adjustment in whatever amount is refunded by the exporting country. However, once Commerce determined the total weight of Dong-Ah's tubes exported to the United States during the investigation period and the total amount of drawback received by Dong-Ah during that time, it calculated actual drawback per kilogram, and allocated total drawback to individual United States sales based on the merchandise adjustment weights. *Remand Determination* at 15–17. By focusing only on the amount of duties refunded, Commerce made adjustments for drawback in the full amount of drawback received even though refunds by the Korean government were based on the generally higher packing list weights. Had Commerce first verified the amount of duties paid by Dong-Ah on imported raw materials used in the exported tire tubes, as required by the statute, the generally lower mer-

chandise weights should have resulted in a lower total amount of drawback for which adjustments could be made under section 1677a(d)(1)(B) (statutory drawback).

The Court therefore directed that if Commerce were to use the merchandise weights, it should determine duties per kilogram paid by Dong-Ah and make adjustments in that amount if sufficient refunds were made, using total drawback per kilogram as a ceiling. Commerce was instructed that the adjustment for drawback could not exceed the lesser of the amount of duties paid or the amount of duty rebates by Dong-Ah.

On January 12, 1987, Commerce reported the results of the recalculation for Dong-Ah:

> [T]he Department examined Dong-Ah's antidumping duty questionnaire response and determined the amount of duty and import taxes paid on raw materials imported to Korea, including the rubber. Then the amount of duty and import taxes Dong-Ah paid on a per kilogram basis was determined for each of the imported raw materials, including rubber, used by the company to make the tubes under investigation.
>
> The Korean government's estimates for determining duty drawback of the quantities of the various materials used to manufacture a one-kilogram tube were used to calculate the import duty cost for one kilogram of raw material. This was done by multiplying the standard quantity of each imported material as determined by the Korean government by the duty paid per kilogram of the material. Adding these figures together, a total duty cost per kilogram of a manufactured tube was calculated. The cost per kilogram of tube was then multiplied by the actual weight of each tube model, as verified by the Department and used in the merchandise adjustments, to arrive at the total duty cost for each tube model and the drawback amount for the imported raw materials.
>
> The Department then determined the drawback amount for the valves by determining from the record the import duties paid for certain valves. For those valves, it has assigned no drawback amount. The drawback amounts for the imported raw materials and the valve were added together for each specific tube to determine the duty drawback adjustment. This calculation has resulted in a weighted average less-than-fair-value margin of 0.017 percent.

The Court was unable to determine from Commerce's report whether the total duties paid by Dong-Ah on raw materials used to manufacture the exported tubes exceeded the amount of duty rebates received by Dong-Ah. Defendant clarified that total duties paid did not exceed refunds received, and thus Commerce did not cap total statutory drawback at the amount of the refunds.

DISCUSSION

Plaintiff argues that weights found on the companies' packing lists are the link between duties paid and drawback received, and unless Commerce uses those weights to make both drawback adjustments and merchandise adjustments, Commerce may not allow adjustments for drawback in this investigation. Plaintiffs contend that Commerce's determination is further flawed by the fact that Commerce did not know the total amount of drawback received by Heung-Ah, and relied on total duties paid as a measure of drawback received under 19 U.S.C. § 1677e(b) (1982). The Court disagrees.

Commerce is not required to use the packing list weights to determine drawback adjustments as argued by plaintiffs. Commerce is only required to use a method which is verifiable and is not based on data inconsistent with data used in determining other weight-based adjustments.

Congress provided for a drawback adjustment when a foreign producer receives a refund of duties it paid on imported materials because of the exportation of the merchandise under investigation. *See* 19 U.S.C. § 1677a(d)(1)(B). In determining whether such an adjustment should be made, Commerce considers (1) whether the import duty and rebate are directly linked to, and dependent upon, one another; and (2) whether the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product. *Remand Determination* at 5–6; *see Certain Tapered Journal Roller Bearings and Parts Thereof From Italy*, 49 Fed. Reg. 2278, 2280 (1984).

Commerce determined that both Dong-Ah and Heung-Ah were entitled to receive adjustments for drawback under these criteria. Its determination was based on a review and verification of drawback applications, quantities of dutiable imported raw materials based on import and export permits, company bank records and data obtained from the Korean Central Bank. *See* R. Docs. 42B, 132, 136. Since there is sufficient evidence underlying Commerce's determination that both companies qualified for adjustments under 19 U.S.C. § 1677a(d)(1)(B), that determination is supported by substantial evidence and in accordance with law.

With respect to Commerce's method of determining the precise amount of statutory drawback for Heung-Ah, 19 U.S.C. § 1677e(b) states in part that:

> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, * * * use the best information otherwise available.

In this case, Commerce sought to obtain information relevant to the amounts of drawback received by Heung-Ah, but the total

amount could not be adduced under the recordkeeping practices maintained by Heung-Ah during the period of the investigation. Transcript of telephone conference of November 25, 1986, at 25–26. Commerce's use of total duties paid as a measure of total drawback rebated was grounded on Korean law, which permits drawback in the full amount of duties paid.

The Court holds that under these circumstances there is a sufficient basis to conclude that Heung-Ah was "unable to produce information" regarding total drawback within the meaning of the best information rule, 19 U.S.C. § 1677e(b). The Court further holds that Commerce's measurement of Heung-Ah's adjustment under 19 U.S.C. § 1677a(d)(1)(B) was reasonable in view of Korean law and this Court's holding that an adjustment for drawback may not exceed the amount of duties paid on raw materials contained in the merchandise exported to the United States.

Plaintiffs also argue that by allocating a total drawback pool over individual sales rather than relying on the packing list data, an overadjustment occurs when drawback allocated to a particular sale exceeds the drawback that would be allocated using the packing list data. "Thus each time Commerce's reallocation of drawback yields an adjustment amount for a particular sale that exceeds the amount of drawback actually received by reason of that transaction, Commerce unlawfully overadjusts, arbitrarily inflates United States price, and makes an unfair comparison with home market sales of the same size at prices which presumably include a lesser amount of unrefunded import duties." Letter of counsel for plaintiffs, dated February 16, 1987, at 1–2.

The Court finds nothing in the statute which prohibits Commerce from allocating total statutory drawback to arrive at a uniform drawback allotment for tube models which is then used to make adjustments in individual sales. Even if Commerce disregarded the verified merchandise weights and used the packing list weights to determine both adjustments, allocations would have to be made to convert packing list information from a shipment basis. The Court has previously affirmed Commerce's discretion in making adjustments based on allocations of aggregate data. *See Brothers Industries, Ltd.* v. *United States,* 540 F. Supp. 1341, 1363–64 (1982).

Plaintiff's suggestion that Commerce reintroduce data from the packing lists and cap drawback for each United States sale at the amount which would apply to each sale using the packing list data would result in Commerce's use of inconsistent weight data, the same irregularity which precipitated the remand. By allocating the total duties paid that were refunded by Korea over individual sales using the merchandise weights, Commerce has applied drawback consistently to tires of uniform weight.

Since Commerce has properly chosen to allocate aggregate drawback over individual transactions and to use a consistent set of weights for its weight-based adjustments, the remand results show-

ing less than fair value margins of 0.017% for Dong-Ah and 0.03% for Heung-Ah is supported by substantial evidence and in accordance with law. Since the margins are concededly *de minimis,* Commerce's negative less than fair value determination is sustained.

CONCLUSION

The purpose of the remand was to eliminate the possibility that Commerce's final negative determination was caused by Commerce's use of conflicting weights in the course of making different adjustments. It is now clear that it did not.

The action is dismissed. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 87–29)

WASHINGTON RED RASPBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE OREGON CANEBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE NORTHWEST FOOD PROCESSORS ASSOCIATION, RED RASPBERRY MEMBER GROUP OF THE AMERICAN FROZEN FOOD INSTITUTE, WASHINGTON RED RASPBERRY GROWERS ASSOCIATION, NORTH WILLAMETTE HORTICULTURAL SOCIETY, RADER FARMS, RON ROBERTS, AND SHUKSAN FROZEN FOODS, INC., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND MALCOLM BALDRIGE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, DEFENDANTS, AND ABBOTSFORD GROWERS CO-OPERATIVE UNION, JESSE PROCESSING LTD., MUKHTIAR & SONS PACKERS, LTD. AND EAST CHILLIWACK FRUIT GROWERS CO-OPERATIVE, INTERVENOR-DEFENDANTS

Consolidated Court No. 85–06–00789

OPINION & ORDER

[Plaintiff's motion for judgment on agency record granted in part and denied in part; remanded to International Trade Administration.]

(Decided March 17, 1987)

Kilpatrick & Cody (Joseph W. Dorn and *Anthony H. Anikeeff)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(J. Kevin Horgan);* and Office of Assistant General Counsel for Import Administration, U.S. Department of Commerce *(Eileen P. Shannon)* for the defendants.

Cameron, Hornbostel & Butterman (William K. Ince and *Caren Z. Turner)* for intervenor-defendants Abbotsford Growers Co-operative Union, Jesse Processing Ltd. and Mukhtiar & Sons Packers, Ltd.

Bogle & Gates (Joel R. Junker and *Christopher N. Weiss)* for intervenor-defendant East Chilliwack Fruit Growers Co-operative.

AQUILINO, *Judge:* This consolidated case encompasses complaints by the plaintiff red raspberry growers, packers and associations (1) that the International Trade Administration, U.S. Department of Commerce ("ITA") unlawfully excluded the Abbotsford Growers' Co-operative Union from its final affirmative determination of sales

at less than fair value in *Red Raspberries from Canada*, 50 Fed. Reg. 19,768 (May 10, 1985), and (2) that that determination contains erroneous weighted-average dumping margins.

The plaintiffs press some eight "methodological errors"[1] in support of their position that the dumping margins are incorrect. As to three of those specifications, counsel for the defendants state:

> * * * [T]he Department concedes that certain mathematical errors were committed in the process of calculating the antidumping duty rates in the final determination of this investigation. Additionally, it is the Department's belief that there may have been other mathematical errors committed, to which plaintiffs have not alluded.
>
> Consequently, the Department requests a remand of this determination after disposition of the other, disputed issues * * *.[2]

A

The first of the disputed issues is whether the ITA erred in disregarding actual transaction prices paid by packers to growers for their raspberries.

Four processor/packers were investigated by the ITA. Intervenor-defendant Abbotsford Growers Co-operative Union ("Abbotsford Co-op") is an association of growers of fruits and vegetables in British Columbia who agree to deliver their produce to the cooperative for processing and marketing. The same is true of intervenor-defendant East Chilliwack Fruit Growers Co-operative ("EC Co-op"). These two cooperatives accounted for most of the exports to the United States of the merchandise investigated, namely, "fresh and frozen red raspberries packed in bulk containers and suitable for further processing",[3] for the period July 1, 1983 to June 30, 1984.

The other two packers, Jesse Processing Ltd. ("Jesse") and Mukhtiar & Sons Packers Ltd. ("Mukhtiar"), processed and exported raspberries grown, for the most part, on associated corporate farms *sub nom.* Jesse Farms Ltd. and Mukhtiar Growers Ltd., respectively. The remainder of the fruit in question was sold to Jesse and Mukhtiar by independent growers. *See* Confidential Document ("ConfDoc") 3.

The petitioners below alleged that home market sales were below the respective costs of production of the merchandise. However, the ITA's final determination states that sufficient such sales of the Abbotsford Co-op and of Mukhtiar were found to be above their costs of production to enable the agency to use those sales for foreign market value. *See* 50 Fed. Reg. at 19,769 and 19,770. On the other hand, the ITA found that "all" or "substantial" home market sales of the EC Co-op and of Jesse were below their costs of production, and it therefore used constructed value for the foreign market value

[1] Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Judgement Upon the Agency Record [hereinafter cited as "Plaintiffs' Memorandum"], pp. 15, 18.

[2] Memorandum of Points and Authorities in Support of Defendants' Partial Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record [hereinafter cited as "Defendants' Memorandum"], pp. 41–42.

[3] 50 Fed. Reg. at 19,768.

of the raspberries exported by those two packers. *Compare* 50 Fed. Reg. at 19,769 *with id.* at 19,770.

In determining whether sales in Canada were below the cost of production, the ITA necessarily attempted to verify each packer's cost in this regard. "This verification included the cost of growing the raspberries by the growers". *Id.* at 19,769. *Cf.* 19 C.F.R. § 353.7(b). Apparently, Abbotsford Co-op and EC Co-op each has hundreds of grower members, more than 100 of whom delivered red raspberries to the former during the period under review; more than 300 growers delivered their fruit to the EC Co-op. *See* ConfDoc 3. A number of the farmers delivered berries to both co-ops, implying thereby membership and thus shareholding in each. The ITA's final determination states that a "sample of ten growers was selected scientifically to represent the cost of raspberries supplied by Canadian growers" to the two cooperatives. 50 Fed. Reg. at 19,769. This sample was chosen to achieve a "95 percent confidence level that the information derived from [it wa]s representative of the population particularly regarding cost of production, its relation to price, and other antidumping investigation considerations". ConfDoc 25, p. 2. The ITA further stated that Jesse and Mukhtiar "purchase nearly all raspberries from their own farms. For them, we treated the cost of production of the farm as representative of the processor's cost of raspberries. 50 Fed. Reg. at 19,769.

Comment 4 of the petitioners below was to the effect that, if a grower's transaction price were higher than its cost of production, that price "should be used regardless of whether it includes profit and regardless of whether the grower is related to the processor." 50 Fed. Reg. at 19,770. The ITA responded to this comment as follows:

> * * * Verification showed that all growers in the sample were related to processors. In accordance with § 353.6(b) of the Commerce Regulations, in our final analysis we cannot use transaction price because all growers are related to the processors. Therefore we used the average cost of production of the growers as the material cost for the processors where the sample was used. For JP and M&S the actual cost of production of Jesse Farms Ltd. and Mukhtiar and Sons Growers Ltd. were used for the respective processor's material cost. *Id.*

The regulation referred to, 19 C.F.R. § 353.6(b), provides, in pertinent part:

> *Transactions with related parties.* Direct or indirect transactions between related parties (as defined in section 773(e)(3) of the Act) may be disregarded if, in the case of any element of value required to be considered pursuant to paragraphs (a)(1), (a)(2) and (a)(3) of this section, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of the merchandise subject to the investigation.

It is premised by the provision of the Trade Agreements Act of 1979 that related-party transactions "may be disregarded", 19 U.S.C. § 1677b(e)(2).

Counsel for the defendants state that the regulation "unmistakably conveys discretion to the administering authority with respect to whether related party transactions should be disregarded",[4] but the ITA representation quoted above that it "cannot" use transaction price is clearly a misstatement of the law. *See, e.g., Connors Steel Company* v. *United States,* 2 CIT 242, 244–45, 527 F. Supp. 350, 354 (1981). Furthermore, while evidence in the record shows that Jesse and Jesse Farms Ltd. and Mukhtiar and Mukhtiar Growers Ltd. are "related parties" within the meaning of 19 U.S.C. § 1677b(e)(3), the same cannot be said of the cooperatives and those member growers selected by the ITA as determinative of the cost of the raspberries.

The statutory definitions of related parties arguably relevant to this action, to wit, subparagraphs (E) and (F) of the foregoing subsection (3), are as follows:

> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.[5]

It is unclear from the record before the court whether membership in the cooperative entails unequal shares therein. Whether unequal or equal however, there is no indication that any one of the sample growers who delivered raspberries to either (or both) of the cooperatives holds five percent or more of the outstanding shares. Indeed, it is not likely that the stock of those growers aggregates five percent in either cooperative. Furthermore, with regard to subparagraph (F), there is no showing that those growers control, are controlled by, or are under common control with, the cooperatives, which apparently are nothing more than convenient regimes for the marketing of farm produce.[6]

Thus, the court concludes that it was not in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B) for the ITA to have disregarded the transactions between the cooperatives and their

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[4] Defendants' Memorandum, p. 12.

[5] These definitions fall within the purview of constructed value. While the ITA, in the end, did not use constructed value for either the Abbotsford Co-op or Mukhtiar, the agency did disregard the prices paid to their growers in determining their costs of production. In other words, the growers' costs of production were used as the equivalent of the packers' costs.

[6] Counsel for the Abbotsford Co-op contend that it "acts as an agent for the growers, trying to obtain the best price for their product." Intervenors', Abbotsford Growers Co-operative Union, *et al.*, Brief in Response to Plaintiffs' Motion for Judgment Upon the Agency Record and in Support of Motion for Leave to Amend Intervenors' Answer to Include a Crossclaim for Revision of Dumping Margin Calculations [hereinafter cited as "Abbotsford Brief"] p. 16.

During oral argument on plaintiffs' motion, counsel for the defendants admitted that the co-operatives do not "fit neatly" into any of the statutory definitions of related parties. Rather, counsel sought refuge on the procedural point that the petitioners had not raised this issue below. The plaintiffs rebutted this argument, persuasively, through their claim that there had been no reason to raise it below in view of past ITA precedent and the absence of factual justification to disregard the prices paid to the growers.

As for the attempts by counsel for the cooperatives to equate their relationships to the growers as that of agent and principal, an agent does not normally control price. If the growers are like other innumerable corporate stockholders, they do not control price either.

growers. The purpose of the law is to permit disregard of transactions where common control of the parties thereto distorts prices paid, but the record does not establish the existence of this phenomenon herein.

The fact that the Jesse corporations and the Mukhtiar corporations are related parties may permit disregard of their internal transactions, but only

> if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. 19 U.S.C. § 1677b(e)(2)

The administrative record indicates that Mukhtiar purchased raspberries from six growers in addition to its related farm during the period under review and that the price paid to Mukhtiar Growers Ltd. was the top one. *See* ConfDoc 3. As for Jesse Farms Ltd., it received a price closer to the top of the range of prices paid to 16 unrelated growers. *See id.* In fact, the Jesse Farms Ltd. price equalled the weighted-average price for all the growers who delivered to Jesse. *Cf. id.* Thus, the court is unable to conclude that the evidence before it satisfies the foregoing statutory standard for disregard of transaction prices and therefore that the ITA's decision not to use such prices in constructing costs of production for Jesse and for Mukhtiar[7] was in accordance with the law. While the defendants have broad discretion in enforcement of this law and their expertise is entitled to "tremendous deference",[8] they are not at liberty to disregard the statute's plain meaning. *See generally Al Tech Specialty Steel Corp.* v. *United States,* 10 CIT ——, Slip Op. 86–124 at 5–7 (Dec. 1, 1986), and cases cited therein.

B

The ITA's final determination states that payments to growers under British Columbia's Farm Insurance Income Program ("FIIP") "were included as offsets to cost since these benefits are attributable directly to raspberry production."[9] The petitioners below objected to this approach in their Comment 9. The ITA's response was adherence to its position. *See* 50 Fed. Reg. at 19,771.

Plaintiffs' present motion seeks judgment on this question. Their challenge, however, is contingent upon a negative resolution of the foregoing point on disregard of the prices paid to the growers. *See, e.g.,* Plaintiffs' Memorandum, pp. 15–16, 23. That is, the treatment of the FIIP benefits has import in the context of constructing the growers' costs of production, which this court has concluded was inappropriate. Hence, plaintiffs' point is no longer pressing.

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[7] The court notes in passing that review of ConfDoc 44 indicates that the costs of the raspberries constructed were 26 and seven percent lower than the respective transaction prices.

[8] *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States,* 713 F.2d 1568, 1582 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

[9] 50 Fed. Reg. at 19,769. The "benefits" referred to also included government wage rebates.

If it still were, the court notes that *Al Tech Specialty Steel Corp. v. United States, supra,* concludes that countervailing-duty law should not be applied to a question such as this and that the government's interpretation of 19 U.S.C. § 1677b(e)(1) is not unreasonable.

C

In constructing the costs of the raspberries for the packers, the ITA, over the petitioners' protestations,

> excluded Canadian packing costs because these costs are not part of the cost of the merchandise sold to the United States. We added the cost of United States packing in accordance with section 773(e)(1)(C) of the Act. 50 Fed. Reg. at 19,770.

The plaintiffs contend that the pails and the drums which were used to pack the raspberries in bulk were "materials" within the meaning of subparagraph (A) of the referenced constructed-value section of the 1979 act and that, as such, their respective costs should have been included thereunder. This court concurs.

Counsel for the defendants argue at page 30 of their memorandum that "[r]aspberries must be placed in containers such as pails and drums before they can be shipped to the United States, or the result becomes raspberry juice, or compote, at least." This is, precisely, the point: when the merchandise is delicate fruit inherently incapable of commercial survival, standing alone, and its intended movement in trade is in its natural form, then the cost of primary containers used is not "incidental" within the meaning of subparagraph (C) of 19 U.S.C. § 1677b(e)(1).

The court finds that the 28-pound pails and the 400-pound drums containing the "fresh and frozen red raspberries packed in bulk * * * and suitable for further processing" were primary containers and an integral part of that merchandise,[10] and the court concludes that the ITA's failure to add their costs to the costs of the raspberries was not in accordance with law.[11]

D

As indicated in the point A, *supra,* the petitioners below failed to persuade the ITA to rely in the ultimate on constructed foreign market value for either the Abbotsford Co-op or Mukhtiar. Plaintiffs' motion for judgment on the record takes the position that it was incorrect for the agency not to have done so, specifically, the ITA (1) "erred by comparing the price of each U.S. sale with the weighted-average price of sales in the Canadian market over 12-months"[12] and (2) "erred by comparing sales of pails and drums". Plaintiffs' Memorandum, p. 36.

As to the first specification, the plaintiffs contend that the ITA

[10] An example of a container in this context which would be "incidental" rather than "integral" would be a crate used to ship a number of the pails or even the drums.

[11] In reaching this conclusion, the court has not read or relied on a second Supplemental Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record, which was transmitted to the court in an untimely motion for leave to file it, since that motion of the plaintiffs must be denied on the ground indicated.

[12] Plaintiffs' Memorandum, p. 34.

> should have compared U.S. sales prices with Canadian monthly weighted-average sales prices. In those months when there were no appropriate home market sales to compare with U.S. sales, the ITA should have used constructed value. *Id.*

They rely on *Fall-Harvested Round White Potatoes from Canada,* 48 Fed. Reg. 51,669 (Nov. 10, 1983), wherein the ITA had modified its "traditional comparison methodology"[13] in order to accommodate "highly variable pricing"[14] associated with that produce.

The defendants counter that their normal practice in fair-value investigations is to use the weighted-average of home-market sales prices during the entire periods of investigation and that this practice is of long standing. They refer the court to *Clear Sheet Glass From Japan,* 47 Fed. Reg. 14,506, 14,507, (April 5, 1982), and *Color Television Receivers From Taiwan,* 49 Fed. Reg. 7,628, 7,636 (March 1, 1984).

Section 615(1) of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948, 3036–37, amended 19 U.S.C. § 1677b(a)(1) to state that the foreign market value of imported merchandise

> shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—
>
> > (A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption * * *.

Self-evidently, time is (and has been) an element of this provision, but it is not one which mandates the restrictive reading the plaintiffs posit. A regulation governing determination of dumping states, in pertinent part:

> **§ 353.20 Sales at varying prices.**
>
> (a) Where the prices of the sales which are being examined for a determination of foreign market value vary (after allowance provided for in §§ 353.14, 353.15, 353.16, and 353.19), *the determination of foreign market value normally will be based upon the weighted average of the sales prices of all merchandise used to determine foreign market value;* provided that where sales are made at different levels of trade, the calculation of foreign market value, in accordance with § 353.19, will be on the basis of sales made at the same or nearest comparable level of trade as those at which the sales in question to the United States are made.
>
> (b) If not less than 80 percent of all sales in the home market (or to third countries, if appropriate) during the period of inves-

[13] 48 Fed. Reg. at 51,673.
[14] 48 Fed. Reg. at 51,672.

> tigation were made at the same price, weighted averages of all sales will not be used and foreign market value will be based upon the sales at that price.
>
> (c) If the provisions of paragraph (b) of this section do not apply and weighted averages of the prices are determined to be inappropriate, the Secretary will use any other method for determining value which he deems appropriate * * *.[15]

Thus, there is a clear legal underpinning to the approach taken by the ITA herein, one which the facts also support. The court has reviewed the listings of Canadian sales of the Abbotsford Co-op and of Mukhtiar contained in ConfDoc 45 which show that less than 80 percent of those sales by each packer were made at the same price. Moreover, the individual prices were not highly variable, as was the case with the potatoes from Canada and which led the ITA to use the periodic method of comparison the plaintiffs propose. Normally, however, as the above regulation makes clear, the sales prices of all the merchandise during the entire period of investigation are to be averaged, and the ITA was within the bounds of this approach here.

Plaintiffs' second specification of error gives rise to the same sort of issue, to wit, not whether the ITA could have determined foreign market value relying on the method proposed, but rather whether the agency was required to accept the petitioners' point, which was:

> *Comment 6:* Raspberries packed in pails should not be compared with raspberries packed in drums. Raspberries packed in pails receive a higher price than raspberries packed in drums. Where a similar pail-to-pail, drum-to-drum merchandise comparison cannot be made, constructed value should be used.
>
> *DOC Position:* The product is identical whether packed in drums or pails. We deducted home market packing from the foreign market value and then added the packing for the U.S. sale being compared. 50 Fed. Reg. at 19,771.

The court cannot agree that the product is identical whether packed in drums or in pails. On the other hand, both 19 U.S.C. § 1677b(1)(A) and 19 C.F.R. § 353.3(a) contemplate foreign market value of "such or similar merchandise", which is defined by 19 U.S.C. § 1677(16) in the following alternative ways:

> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purpose for which used, and

[15] 19 C.F.R. § 353.20 (emphasis added). The other regulations referred to in subparagraph (a), namely, sections 353.14, 353.15, 353.16 and 353.19 of Title 19, C.F.R., apply to differences in quantities, differences in circumstances of sale, differences in physical characteristics, and level of trade, respectively.

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

Given these definitions, this court cannot, and therefore does not, conclude that it was not in accordance with law for the ITA to have determined the foreign market value of the red raspberries from the Abbotsford Co-op and from Mukhtiar irrespective of whether in pails or in drums.

E

The final issue contested by the defendants[16] arises out of the ITA's decision not to follow its rule governing conversion of currencies, 19 C.F.R. § 353.56(a), which is based on section 522 of the Tariff Act of 1930, 31 U.S.C. § 5151. The ITA chose not to comply with this law, as explained in the following response to a comment of the respondents below:

Comment 1: The Canadian dollar declined by almost 7 percent in value compared with the U.S. dollar over the investigative period. The DOC used only the third quarter exchange rate to convert Canadian dollar values into U.S. dollar values. Current DOC regulations require conversion of foreign currencies as of the date of exportation, if an exporter's sales price is the basis of comparison. However, recent amendments to the antidumping statute establish that foreign market value must be determined at the time imported merchandise is first sold by the importer to an unrelated purchaser in an exporter's sales price situation. Therefore, foreign market value should be determined at the time of sale and converted to U.S. dollars at the exchange rate on the date of sale.

DOC Position: We agree that, if possible, the exchange rate in effect at the time of the U.S. sale should be used to convert foreign currency to U.S. dollars. This appears to be more consistent with section 615 of the Trade and Tariff Act of 1984 [1984 Act]. Therefore, we chose not to follow § 353.56(a)(2) of the Commerce regulations which predates the 1984 Act. 50 Fed. Reg. at 19,771.

[16] As indicated above, page 2, the defendants do not contest certain issues raised by the plaintiffs, to wit, (F) "The ITA Erred By Failing To Include All Positive Potential Uncollected Dumping Duties In Calculating The Weighted-Average Dumping Margins For East Chilliwack And For Other Manufacturers/Producers/Exporters"; (G) "The ITA Erred In Calculating And/Or Expressing Weighted-Average Dumping Margins for Abbotsford, Mukhtiar, and East Chilliwack"; and (H) "The ITA Erred By Failing To Use Constructed Value For The Determination of Foreign Market Value As To Abbotsford And Mukhtiar". Plaintiffs' Memorandum, pp. 43–46.

The gist of defendants' position now is that this

> decision was the only appropriate one in light of the mandate of section 615 of the Trade and Tariff Act of 1984. To have done otherwise would have conflicted with the Act, and an agency is not allowed to interpret its regulations in a manner that conflicts with statutory law. Defendants' Memorandum, p. 40.

Of course, it is axiomatic that an administrative regulation should not conflict with an underlying statute,[17] but it is somewhat disingenuous for the defendants to attempt to undermine their rule, 19 C.F.R. § 353.56(a), based squarely as it is on a statute in existence for more than half a century. Nevertheless, the will of Congress, as expressed in section 626 of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948, 3042–43, was that section 615 thereof take effect on the date of enactment, October 30, 1984—or well before the ITA final determination now under review herein.

It could be correct, as the plaintiffs argue, that "Congress may have erred as a policy matter by failing to amend Section 522 to conform more closely with other provisions of the 1984 act",[18] but it does not necessarily follow, as they also imply, that the ITA cannot apply the new law until Congress perfects the old. As indicated, there is no such proscription in the 1984 statute. Moreover, the court concludes that the ITA's reliance on section 615 was an appropriate exercise of its authority to determine foreign market value. That is, it would now be anomalous for the time of the first sale of imported merchandise within the United States to an unrelated purchaser to be the point of reference for foreign market value in accordance with section 615, while converting the foreign currency involved "as of the date of exportation" within the meaning of section 353.56(a)[19] which may have been months or even calendar quarters earlier.

The plaintiffs argue that an agency is bound by its own regulations. This, of course, it true, but only so long as Congress does not act to modify the statutory framework within which they function. Moreover, the court does not understand the plaintiffs to argue against retroactive application of the statute, no doubt because they understand the complexity of this question in the context of legislation. *See, e.g.,* Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision,* 126 U.Pa.L.Rev. 47 (1977). Indeed, it is difficult to discern any form of reliance by them on what is admittedly a long-standing statute and rule.

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[17] *See, e.g., Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed.Cir. 1984), and the cases cited therein.

[18] Plaintiffs' Reply Brief, p. 27.

[19] Intervenor-defendants' attempted reliance on subsection (b) of this rule is misplaced, as that provision entails special rules for "sustained changes in prevailing exchange rates" and differences between prices "resulting solely from such exchange rate fluctuations". *See Melamine Chemicals, Inc.* v. *United States, supra* note 17.

While the value of the Canadian to the U.S. dollar did decline during the period of investigation [*see, e.g.,* RecDoc 108 at A–54], the decrease was linear and slight; there was no fluctuation, and certainly not the "volatile changes" experienced in *Melamine. See* 732 F.2d at 932.

MOTIONS AS TO CROSS-CLAIMS

At the same time as the Abbotsford Brief was filed in opposition to plaintiffs' motion for judgment on the agency record, counsel for the three intervenor-defendants represented therein interposed a motion for leave to amend their answer to include a cross-claim against the defendants. The proposed claim is pleaded in three counts and seeks remand to the ITA "with instructions that the ITA recalculate dumping margins and correct any and all mathematical errors", to quote from its last prayer for relief.

The Abbotsford Co-op, Jesse and Mukhtiar obtained leave to intervene in these consolidated case(s) and file their answer(s) as parties defendant months after the plaintiffs had commenced the present proceedings. By then, the time prescribed by statute within which these three packers could have brought an action of their own against the defendants had expired. This fact, which the intervenor-defendants do not dispute,[20] has led both the plaintiffs and the defendants to oppose the motion to amend on jurisdictional grounds. This opposition is well-founded.

Unlike the three movants, the EC Co-op had commenced a timely action in its own right against the defendants, challenging the ITA's final determination in CIT No. 85–07–00978. In that case, the petitioners below (plaintiffs here) obtained leave to intervene as parties defendant, and they subsequently sought affirmative relief therein against the defendants, initially through their brief in opposition to the EC Co-op's motion for judgment on the agency record and then by way of formal motion to file an amended answer.

This court granted the EC Co-op's motion to strike the claim for relief and denied the intervenor-defendants' motion to amend in *East Chilliwack Fruit Growers Co-operative* v. *United States,* 11 CIT ——, Slip Op. 87–16 (Feb. 13, 1987), in view of *Nakajima All Co., Ltd.* v. *United States,* 2 CIT 170 (1981) (an intervening party cannot contest an antidumping-duty order through a cross-claim which does not comport with the time limitations imposed by 19 U.S.C. § 1516(a)). The court also relied on *Fuji Electric Co., Ltd.* v. *United States,* 7 CIT 247, 595 F. Supp. 1152 (1984), and on *Georgetown Steel Corporation* v. *United States,* 801 F.2d 1308, 1312 (Fed. Cir. 1986), wherein the Court of Appeals stated:

> Since section 1516(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions * * *. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit." [citations omitted]

[20] *See* Defendant Intervenors', Abbotsford Growers Co-Operative Union, *et al.*, Supplemental Brief in Support of Motion to Amend Intervenors' Answer, p. 2.

It is clear that this court does not have jurisdiction to entertain intervenor-defendants' proposed cross-claim, and their motion for leave to amend their answer to include it must therefore be denied.

The same conclusion of law warrants granting a motion by the plaintiffs to strike part II.A.1 (pages 1–4) of the EC Co-op's memorandum in opposition to their motion for judgment on the record. The plaintiffs, joined by the defendants, contend that the referenced part, which alleges that the ITA failed to convert the EC Co-op's foreign market value into U.S. dollars, amounts to an untimely cross-claim. The court concurs, not only as a result of examination of the memorandum itself, the conclusion of which (pages 34–35) prays for a remand on the issue, but also because the EC Co-op subsequently obtained leave to amend its own complaint to include the same claim, which has already been remanded to the ITA.

* * * * * * *

Now, therefore, in view of the foregoing, it is

ORDERED that plaintiffs' motion pursuant to CIT Rule 56.1 for judgment upon the agency record be, and it hereby is, granted on points lettered A and C thereof and on points F, G and H to the extent conceded by the defendants; and it is further

ORDERED that plaintiffs' motion pursuant to CIT Rule 56.1 for judgment upon the agency record be, and it hereby is, denied on points lettered B, D and E thereof; and it is further

ORDERED that this matter be, and it hereby is, remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with the above opinion on the aforesaid points A, C, F, G and H; and it is further hereby

ORDERED that the defendants file with the court their redeterminations of the points remanded within 45 days hereof, that the plaintiffs have 15 days thereafter in which to respond and that the defendants and the intervenor-defendants have ten days to reply thereto; and it is further

ORDERED that the other outstanding motions of the parties be, and they hereby are, disposed of in accordance with the above opinion.

(Slip Op. 87–30)

R.J.F. FABRICS, INC., PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, REGIONAL COMMISSIONER OF CUSTOMS AT NEW YORK, AND THE AREA DIRECTOR OF CUSTOMS AT NEWARK, DEFENDANTS

Court No. 86–11–01376

Before TSOUCALAS, *Judge.*

[Defendants' motion to dismiss for failure to state a *prima facie* case granted.]

(Decided March 18, 1987)

Soller, Singer & Horn (Carl R. Soller, Gerald B. Horn, Melvin E. Lazar, and *Margaret H. Sachter)* for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Florence M. Peterson)* for defendants; *Deborah Rand,* Assistant Regional Counsel, U.S. Customs Service, of counsel.

OPINION

TSOUCALAS *Judge:* This opinion represents the final turn, in this Court, on the tortuous road that this matter has travelled. This case, which has been at times the subject of daily developments, has alternatively exhibited fascinating and frustrating facets, and has raised questions concerning jurisdiction, discovery, the effect of related criminal proceedings, and the quantum of proof necessary to overcome the presumption in favor of Customs' decisions.

BACKGROUND[1]

By notice dated July 1, 1986, Customs announced that "live" entry procedures, barring the exercise of immediate delivery privileges, would be applied to certain shipments of textiles in an effort to prevent circumvention of "quota and visa requirements by transshipping merchandise through Japan and entering it as a product of Japan." 51 Fed. Reg. 23,736 (1986). On July 2 and July 11, 1986, Customs denied entry of the subject merchandise, described as "100% Polyester Double Georgette Piece Dyed, Textile Piece Goods" and alleged by plaintiff R.J.F. Fabrics, Inc. (hereinafter "RJF") to be a product of Japan. On August 15, 1986, the goods were seized pursuant to 19 U.S.C. § 1592 (1982) and 18 U.S.C. § 545 (1982). The federal defendants (hereinafter "defendant" or "United States") allege that the textiles were actually a product of Korea and were offered for entry into the United States with false entry papers in an attempt to by-pass quota/visa restrictions on Korean textiles.

Upon denial of the protest against the exclusion of its merchandise, plaintiff commenced an action in this Court seeking a preliminary injunction—returning the textiles to its custody—as well as declaratory relief concerning the country of origin of the goods. The Court denied the request for injunctive relief but ultimately assumed jurisdiction "for the purpose of issuing a declaratory judgment as to the true country of origin of the goods." *R.J.F. Fabrics, Inc.,* Slip Op. 86–137 at 3.

On December 16, 1986, defendant moved for a stay of the civil action in favor of related criminal proceedings commenced in the United States District Court for the Southern District of New York. Defendant explained that Customs instituted an investigation, in February 1984, into the transshipment of textiles after import specialists at the Port of Los Angeles, California, uncovered what was believed to be evidence of Korean man-made textile fabric entered

[1] The Court has issued two prior opinions in this action. The reader is referred to these opinions for a more complete exposition of previous developments. *See R.J.F. Fabrics, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–137 (Dec. 22, 1986); *R.J.F. Fabrics, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–123 (Dec. 1, 1986).

as a product of Japan. The probe soon spread both domestically and internationally. In connection with the investigation, a number of search warrants were directed against the premises of importers in several cities. In November 1985, the criminal investigation of RJF was referred to an Assistant United States Attorney in the Southern District of New York. On August 11, 1986, a search warrant was executed on plaintiff's premises in New York City on probable cause that materials relevant to the alleged fraudulent importation scheme might be recovered.

Of particular significance was defendant's representation that, subsequent to the date of the order exercising jurisdiction over plaintiff's claim for declaratory relief, the criminal case against plaintiff had been presented to a grand jury. Defendant explained that it had postponed discovery at plaintiff's request after negotiations with the U.S. Attorney's office, involving possible withdrawal of the instant action, had begun. When those negotiations collapsed, defendant moved to stay these proceedings. Defendant argued that its ability to conduct discovery had been hampered by certain developments related to the criminal proceedings. For example, Mr. Mark Cassuto, described by defendant as plaintiff's buying agent, had been arrested.[2] Mr. Isaac Cavaliero, Secretary/Treasurer of RJF, became unavailable due to the exercise of his Fifth Amendment privilege against self-incrimination. Additionally, while the record is not entirely clear on this point, it appears that Mr. Richard Fiorillo, President of RJF, would be similarly unavailable.

A conference concerning the motion to stay was held in chambers, between the Court, counsel for the parties, Ms. Deirdre Daly, an Assistant United States Attorney in charge of the criminal matter, and Mr. Steven Yagoda, a special agent for Customs. At that time, the Court, over plaintiff's objection, viewed, *in camera*, certain materials presented by Ms. Daly and Mr. Yagoda relating to the alleged transshipment scheme. Several days later, the Court stayed plaintiff's action for a period of twenty-one (21) days. *See R.J.F. Fabrics, Inc.*, Slip Op. 86–137 at 11.[3] The Court was concerned that, although the sole issue in the case at bar was that of country of origin, the civil discovery process might be abused to gain information not obtainable under the more limited criminal discovery rules. Moreover, defendant's ability to conduct discovery had been curtailed by the legitimate noncooperation of plaintiff's agents. It was

[2] At a conference with the Court, plaintiff's counsel, without elaboration, denied that Mr. Cassuto was plaintiff's buying agent. Mr. Cassuto's attorney, in a letter to defendant's counsel, has described his client as acting as an "importer's agent." Further, he explained that Mr. Cassuto has been advised to assert his Fifth Amendment privilege at a deposition that was to be held on December 22, 1986. Letter from Angelo T. Cometa to Florence M. Peterson (Dec. 18, 1986).

[3] In response, plaintiff's counsel wrote to the Court seeking reconsideration of the order granting a stay. Letter from Gerald B. Horn (Dec. 23, 1986). At the outset, I note that the proper vehicle for such a request is a formal motion. In any event, plaintiff, while recognizing the Court's authority to grant a stay, suggested that "due process dictates that the government either release this merchandise * * * or that the Court afford us an opportunity for a determination on the merits herein as quickly as possible." *Id.* While a due process claim has never been formally briefed or presented to this Court, it should be noted that plaintiff chose to litigate the country of origin issue in this forum, and that the matter was tried approximately five months after the seizure occurred. The Supreme Court has held considerably longer delays not to be *per se* violative of due process. *See United States* v. *$8,850 in United States Currency*, 461 U.S. 555, 569 (1983) (forfeiture proceedings commenced 18 months after seizure). *See also Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 547 (1985) (nine month adjudication following loss of property interest). Further, the need to process related criminal proceedings may serve to justify a delay in conducting a post-seizure hearing. *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1163 (2d Cir. 1986) (citing *United States* v. *$8,850*).

noted that upon termination of the initial period of stay, all relevant factors, including the progress of the criminal proceedings, would be considered in deciding whether to renew the stay. It soon became apparent that, despite the clear impression previously conveyed to the Court, defendant had no intention of expeditiously pursuing the criminal case, nor of instituting civil forfeiture proceedings. At this point, the Court concluded that the tension between plaintiff's interest in continuing a properly commenced civil action and the public interest in an unimpeded criminal investigation must be resolved by not renewing the stay. Accordingly, the case was scheduled for trial.

TRIAL

On the day this action was scheduled for trial, counsel for plaintiff informed the Court that it was not prepared to present its case. The Court offered plaintiff the option of either commencing trial or continuing the action for two months. Despite an objection, plaintiff opted to commence trial immediately.

Plaintiff called the following witnesses: Mr. George A. McIntyre, Customs Inspector; Mr. Andrew J. Boland, Import Specialist; Mr. Rudolpf W. Stierle, Supervisory Paralegal Specialist; Mr. Henry Kleinpeter, Mr. Anthony J. Diiorio, Mr. Steven Yagoda, Special Agents for Customs; and Mr. Peter Jacobus, owner of Trimodal International, Ltd., plaintiff's customhouse broker.[4] Plaintiff offered into evidence, *inter alia*, the entry documentation contained in the government agents' files relevant to the subject goods. Defendant made clear that it objected to the admission of these documents to the extent that they were offered to prove the country of origin of the textiles. Trial Transcript at 81–82 (hereinafter "Tr. at ——"). The testimony of plaintiff's witnesses can be summarized as follows.

Mr. McIntyre is a Customs inspector. Tr. at 40–41. His duties, which are more limited than those of a Customs investigative agent, consist of reviewing documents and conducting a superficial examination of the merchandise in search of possible quota/visa violations relating to textile importations. Tr. at 41, 53. On referral from Import Specialist Boland, Tr. at 48, he looked at the entry documentation, including the invoice, packing list, single country of origin declaration, and bill of lading, which indicated Japan as the country of origin. Tr. at 50. He also observed "inspection stickers," placed by independent packers, signifying that the merchandise, wherever produced, was exported from Japan. Tr. at 52, 54. While he made no independent inquiry into the facts surrounding the subject entries, cursory examination of the documents and comparison with the markings on the containers revealed no discrepancies with regard to country of origin. Tr. at 50, 53.

Mr. Boland, an import specialist assigned to John F. Kennedy Airport, classifies and appraises imported merchandise. Tr. at 59.

[4] Messrs. Kleinpeter, Diiorio, and Yagoda offered no testimony relevant to the substantive issue in this action.

He testified that Customs agents in Newark, New Jersey, informed him of an inquiry into a transshipment scheme involving Korean goods. Import Specialist Boland did not make a determination as to the correctness of the documents but noted that they "all reflected country of origin to be Japan." Tr. at 62. He executed a form announcing that the subject shipment had been "examined and released by Inspector McIntyre" and further directing those with problems concerning release of same to contact Mr. McIntyre. Plaintiff's Trial Exhibit 3; Tr. at 65–67. The goods, however, were never released.

Mr. Rudolpf Stierle, a Supervisory Paralegal Specialist in Newark, New Jersey, in charge of the Fines, Penalties and Forfeitures Office, testified, over objection of defendant's counsel, that he reviewed the report made by the seizing officer, Mr. McIntyre. He made no independent investigation as to whether there had been any violation of the Customs laws, but on the basis of the review conducted, he concluded that there had been such a violation. Tr. at 75–76.

Mr. Jacobus testified that his company is authorized by plaintiff to serve as its customhouse broker. He summed up his responsibilities as "mak[ing] entry for the goods coming into the country." Tr. at 116–17. He admitted that he did not have free access either to plaintiff's business records or its premises. Tr. at 148. He disavowed any independent knowledge concerning purchase orders and opined that Mr. Isaac Cavaliero was the individual at RJF with such knowledge. Tr. at 141, 145. Claiming it was reasonable to do so, Tr. at 152, Mr. Jacobus relied on invoices prepared by plaintiff's employees to complete the required entry documentation.[5] Tr. at 143. In short, he had no independent information as to any of the relevant transactions, and essentially passed on to Customs information received from plaintiff.[6] Tr. at 144.

At the close of plaintiff's case, the Court reserved decision on defendant's motion to dismiss for failure to state a *prima facie* case. Defendant then proceeded to present its case-in-chief. The Court now holds that plaintiff has failed to set forth a *prima facie* case supporting its contention as to country of origin and therefore its action is dismissed.

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[5] This is underscored by the statement appearing in upper-case print on the invoice submitted to RJF by the broker:

> Except for customs entries and duties, we are independent contractors, the submission of incomplete or inaccurate information related to an import entry (including descriptions, quantities, weights, purchase prices, discounts, commissions, changed selling prices at the time of exportation, assists, *country of origin*, etc.) makes you liable to severe governmental penalties and sanctions, in the event the information forwarded to us, or which accompanied the shipment, does not accurately reflect the entire transaction, it is essential that you immediately notify us so that we can take corrective action.

Plaintiff's Trial Exhibit 11 (emphasis added).

[6] Mr. Jacobus was produced for deposition as agent of the corporate plaintiff pursuant to the Court's pre-trial order. In response, defendant moved to assess expenses and sanctions against plaintiff for failure to designate a suitable agent for deposition within the meaning of USCIT R. 30(b)(4). In an unpublished order, the Court, recognizing that the designation of Mr. Jacobus is in technical compliance with the literal terms of the order, and not wishing to stultify vigorous advocacy, denied the motion. The Court is mindful, however, that the plaintiff corporation is obligated to produce persons "who consent to testify on its behalf as to matters known or reasonably available to the organization." *Mitsui & Co. (U.S.A.), Inc.* v. *Puerto Rico Water Resources Auth.*, 93 F.R.D. 62, 66 (D.P.R. 1981). Furthermore, where such individuals are otherwise unavailable, the corporation should appoint a new agent capable of testifying or producing documents as the situation requires. *See United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *In Re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); *United States* v. *Barth*, 591 F. Supp. 91 (D. Conn.), *aff'd in part, rev'd in part and remanded*, 745 F.2d 184, 189 (2d Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985).

DISCUSSION

Plaintiff has the burden of proving the country of origin of the textiles. 28 U.S.C. § 2639(a)(1) (1982). Further, Customs is presumed to have found every fact necessary to sustain its decision. *See W.A. Gleeson* v. *United States,* 58 CCPA 17, 21, C.A.D. 998, 432 F.2d 1403, 1406 (1970). Plaintiff contends that the entry papers, authenticated by its witnesses, are sufficient to establish a *prima facie* case. Since, in plaintiff's view, defendant has presented no evidence supporting its contention that the goods originated in Korea, plaintiff argues that it must prevail. *See Plaintiff's Post-Trial Brief* at 12–13. The Court disagrees.

Plaintiff relies principally on *United States* v. *Bloomingdale Bros. & Co.,* 10 Ct. Cust. App. 149, T.D. 38,400 (1920) for the proposition that "[n]ot only is the invoice *prima facie* evidence of that which it declares, but unimpeached and not mistrusted or discredited, it is *the* evidence which determines the collector's action as to all imported merchandise which has not been examined." *Bloomingdale,* 10 Ct. Cust. App. at 152. This broad language, however, must be understood within the factual context of that decision. First, in *Bloomingdale,* there was no objection to the admission of the invoice as evidence of its contents. *W.T. Grant Co.* v. *United States,* 23 Cust. Ct. 58, C.D. 1191 (1949), *aff'd,* 38 CCPA 57, 64, C.A.D. 440 (1950). "[T]he trial court [in *Bloomingdale*] was entitled in its discretion to give the invoice descriptions such weight as it felt they were entitled. The invoice descriptions being in evidence, this court held on appeal that there was some evidence in the record to support the trial court's decision." *W.T. Grant Co.,* 38 CCPA at 64. Second, it is only proper to rely on invoices alone to prove their contents where the presumption of correctness has first been negated without regard to the documents. *See Joseph E. Seagram & Sons, Inc.* v. *United States,* 30 CCPA 150, C.A.D. 227, *reh'g denied per curiam,* 30 CCPA 158 (1943). *See also W.T. Grant Co.,* 38 CCPA at 67–68 (O'Connell, J., dissenting) (where independent evidence nullified presumption, invoice may serve as proof of facts contained therein).

The proper statement of the rule, expressed in a number of decisions, is that "invoices and papers accompanying the entries are not sufficient, standing alone, to overcome the presumption of correctness" attaching to Customs' decisions. *Colonial Metals Co.* v. *United States,* 61 Cust. Ct. 29, 33, C.D. 3521, 288 F. Supp. 396, 399 (1968) (country of origin certificate insufficient to establish goods as product of Cuba) (citing *United States* v. *Hercules Antiques,* 44 CCPA 209, C.A.D. 662 (1957)); *United States* v. *Ocean Brokerage Co.,* 11 Ct. Cust. App. 38, 41, T.D. 38,648 (1921); *Hull* v. *United States,* 10 Ct. Cust. App. 211, 213–15, T.D. 38,556 (1920); *United States* v. *Nat'l Aniline & Chem. Co.,* 3 Ct. Cust. App. 10, 17, T.D. 32,287 (1912); *Meier & Frank Co.* v. *United States,* 40 Cust. Ct. 656, 661, Reap. Dec. 9057 (1958) (dictum) (consular invoice alone insufficient to prove its

contents). To hold otherwise would, in effect, render the presumption a nullity, since the importer could simply rest on documents previously rejected by Customs. *See Oakland Food Prods. Co.* v. *United States,* 32 CCPA 28, 30, C.A.D. 281 (1944). In the instant case, essentially the only proof offered were the documents. Simple examination of at least some of them reveal that they lack probative value. For example, as defendant notes, the Single Country of Origin Declaration is signed by Yoshio Nakamichi as export manager for Nakamichi Trading Co., Ltd., but there is no evidence whatsoever to establish his identity nor the veracity of his unsworn statement. *Defendant's Post-Trial Brief* at 5.

Plaintiff's witnesses contributed absolutely nothing beyond what was contained in the entry documents. Mr. Jacobus testified that he completed the entry papers based on information received from RJF, and he had no independent knowledge of the transaction at issue. Indeed, he has no knowledge of plaintiff's business affairs beyond that which is necessary to fulfill his role as customs broker. Nor does the testimony of the government agents add anything to plaintiff's case. Their "knowledge" of the country of origin was confined to reading the aforementioned entry documentation. The following statement, concerning testimony that goods had been imported directly into the United States, is applicable in the instant case:

> The witness had no first-hand knowledge as to where the merchandise came from, and was not in Holland when it was purchased. He testified that his knowledge of the purchases was derived from "what was put on the invoice and from bills that were given at the same time." Testimony based on such information is obviously hearsay and adds little evidentiary value to the invoices themselves. It seems clear that since the invoices are not sufficient to show that the collector's ruling is incorrect, the testimony of a witness who knows little or nothing about this particular importation except what he has learned from invoices, is equally insufficient.

Hercules Antiques, 44 CCPA at 217.[7]

Plaintiff misperceives the nature of these proceedings when it complains:

> It would be a terrible inequity if the Government, by doing nothing, could succeed upon such a flimsy case in defense, and so avoid the burdens of proof that would be placed on it if it were forced to take the initiative in further legal action against RJF. In a criminal action, the Government would have to prove its case beyond a reasonable doubt. Even if Customs decided to bring a civil action under 28 U.S.C. 1582 in this Court to collect penalties under 19 U.S.C. 1592, the burden of proof would be allocated to the Government by that statute.

[7] Plaintiff's witness in *Hercules* had personal knowledge of longstanding industry practice concerning the type of goods being imported. Nonetheless, the court rejected his testimony since he lacked specific information as to the importations at issue. The testimony offered in the instant case is even less probative than that in *Hercules,* since the documents are the only source of information for the witnesses.

Plaintiff's Post-Trial Brief at 23. Plaintiff is obliged to prove its case as it, not defendant, has instituted this action. Plaintiff must be aware that it could have pursued other legal remedies,[8] but, whether for tactical or other reasons, it has chosen this forum to adjudicate this matter. Therefore, plaintiff must accept the evidentiary burden allocated to it by law. It may not point to what it views as an absence of evidence on defendant's part to substitute for its failure to produce credible evidence from those with direct knowledge as to the source of the goods.

CONCLUSION

Plaintiff's case is insufficient to sustain its burden of proof and accordingly the motion to dismiss is granted.

(Slip Op. 87–31)

UNITED STATES, PLAINTIFF *v.* STANLEY GORDON, DEFENDANT

Court No. 84–1–00074

(Decided March 20, 1987)

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Velta A. Melnbrencis),* Civil Division, United States Department of Justice, for plaintiff.

Fronefield & deFuria (Leo A. Hackett), for defendant.

OPINION AND ORDER

RESTANI, *Judge:* In this dismissed case the United States has requested that an interlocutory opinion be vacated following settlement. The motion is unopposed.

There is a clear circumstance in which vacatur of a judgment on mootness grounds is appropriate. *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950) directs that when a case becomes moot by happenstance pending appeal of the judgment below vacatur is the appropriate means of avoiding *res judicata* effects. There is some debate about application of *Munsingwear* to cases where mootness is the intended result of action by the appellant. *Compare Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters,* 686 F.2d 720 (9th Cir. 1982) (vacatur of lower court judgment not appropriate where parties settled while action was on appeal) *and Center for Science in the Pub. Interest* v. *Regan,* 727 F.2d 1161 (D.C. Cir. 1984) (where promulgation of new rescissory regulation by Treasury department rendered controversy over old regulation moot, portion of lower court's opinion explaining the inadequacy of original rescissory regulation not vacated) *with Harrison Western Corporation* v.

[8] For example, a motion to compel forfeiture proceedings might properly lie. *See Castleberry* v. *Alcohol, Tobacco and Firearms Div. of the Treas. Dep't,* 530 F.2d 672, 674–75 (5th Cir. 1976). If plaintiff has been subject to an unlawful seizure, it may be able to move for return of its merchandise pursuant to Fed. R. Crim. P. 41(e). *See generally United States* v. *Rapp,* 539 F.2d 1156 (8th Cir. 1976); *Ross* v. *Meese,* 625 F. Supp. 971 (E.D.N.C. 1986).

United States, 792 F.2d 1391 (9th Cir. 1986) (judgment properly vacated after parties signed new contract which legally extinguished all claims under old contract, thus precluding relitigation of issues in lower court's judgment) *and Kitlutsisti* v. *ARCO Alaska, Inc.*, 782 F.2d 800 (9th Cir. 1986) (vacatur appropriate where case was not mooted to avoid preclusive effect of district court's judgment). Other cases have applied *Munsingwear* more broadly. *See, e.g., Hendrickson* v. *Secretary of Health and Human Services*, 774 F.2d 1355 (8th Cir. 1985).

The case at hand, however, resulted only in a decision related to discovery, a purely interlocutory matter. It has no continuing effect between the parties and clearly no *res judicata* effect. There is no *judgment* to be vacated. In such a case vacation on an opinion and order is within the discretion of the court. Such a case is not controlled by *Munsingwear. See Babcock & Wilcox Co.* v. *United States*, 4 CIT 3, 5–6 (1982); *Simonds* v. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079, 1086–87 (D. Mass. 1980).*

When vacatur will aid settlement, vacatur seems the better course of action. *Cf. Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280, 283 (2d Cir. 1985) (judgment vacated to aid settlement where controversy not moot). Other interests of justice also may warrant consideration of vacatur.

The United States offers no sound reason for vacatur here. Requests to vacate interlocutory opinions and orders in dismissed cases invite a waste of judicial resources.

The motion to vacate opinion is denied.

(Slip Op. 87–32)

AMERICAN AIR PARCEL FORWARDING CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83–7–00995

Before DICARLO, *Judge.*

Plaintiffs challenge the determination by the United States Customs Service (Customs) that the value of made-to-measure apparel from Hong Kong when sold to American customers by a Hong Kong distributor constitutes the transaction value of the merchandise under 19 U.S.C. § 1401a (1982). Plaintiffs claim that transaction value should be based on the cost to the distributor of fabric, tailoring and packing.

Held: Customs properly determined that the value of the merchandise when sold by the Hong Kong distributor to American customers constitutes "the price actually paid or payable for the merchandise when sold for exportation to the United States" under section 1401a.

[Judgment for defendants.]

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*This case also bears no relation to decisions which are vacated because the court had no jurisdiction when the decision was issued. *See, e.g., Continental Steel Corp.* v. *United States*, 9 CIT ——, 614 F. Supp. 548 (1985), *rev'd in part, vacated in part, remanded sum nom. Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986), *reh'g denied*, No. 85–2805 (Oct. 16, 1986).

(Decided March 20, 1987)

McLaughlin & Stern, Ballen and Ballen (S. David Harrison) for plaintiff, American Air Parcel Forwarding Company, Ltd.

Sandler & Travis (Leonard Rosenberg) for plaintiffs, St. Paul Fire and Marine Insurance Co. and E. C. McAfee Co.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Kenneth N. Wolf),* for defendants.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs contest the denial of a protest challenging the valuation by the United States Customs Service (Customs) of apparel made in Hong Kong for sale in the United States. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1982). The action is dismissed.

The parties have submitted a stipulation which constitutes the facts in this case. The merchandise consists of a single entry of made-to-measure wearing apparel. The question presented is whether Customs properly determined the transaction value of the merchandise under section 402 of the Tariff Act of 1930, as amended by section 201 of the Trade Agreements Act of 1979, 19 U.S.C. § 1401a, which states in part that

> The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, * * *.

19 U.S.C. § 1401a(b). For prior rulings in this case, see 7 CIT 231, 587 F. Supp. 550 (1984) and 6 CIT 146, 573 F. Supp. 117 (1983).

American customers purchase the made-to-measure clothing from a distributor in Hong Kong. The customers select fabric and place orders with the distributor either by mail order or by visiting retail stores in Hong Kong. The distributor supplies fabric to a Hong Kong tailor, which manufactures the garments and returns finished garments to the distributor. The operations performed by the tailor are defined in the stipulation as follows:

> *Cut, Make and Trim ("CMT")*—CMT is the shorthand for the operations which involve the cutting of the Fabric to the specifications and measurements of the Customer, the sewing (making) of the parts which have been cut, and the supplying of the Trim for the particular garment. The CMT operations, when taken together, approach the cost or value of the Fabric.

After it receives the finished garments, "the distributor packs the garment, addresses the package, and if necessary, obtains quota and visa, and gives the package to a freight forwarder." Stipulation at 2–3. The importer of record is American Air Parcel Forwarding Company, Ltd. (American Air Parcel), a Hong Kong corporation which "consolidates individual shipments of wearing apparel in Hong Kong for transport to the United States." Complaint at 1–2. American customers are individual consignees who "are required to pay the delivering party any duty tendered by or on behalf of

[American Air Parcel] and a small handling charge." Complaint at 2.

Customs determined "the price actually paid or payable for the merchandise when sold for exportation to the United States" under section 1401a(b), to be the price paid by American purchasers to the Hong Kong distributor. Plaintiffs say that the merchandise should be valued at the price paid by the Hong Kong distributor to the tailor in Hong Kong, plus the cost or value of the fabric furnished to the tailor by the distributor and the packing costs.

Plaintiffs claim that Customs is bound to accept their proposed valuation method based on two Customs rulings. *See Customs Valuation Under the Trade Agreements Act of 1979,* Ruling No. 8 (TAA No. 8), and Ruling No. 10 (TAA No. 10). Such rulings represent the position of Customs with respect to applicable merchandise under described circumstances, until the rulings are modified or revoked. 19 C.F.R. § 177.9(a), (b). TAA No. 10, which governed the valuation of made-to-measure clothing from Hong Kong, was revoked by Customs in TAA No. 40. A judge of this Court ruled that the retroactive revocation of TAA No. 10 was proper since the facts on which Customs issued the ruling contained material inaccuracies. 7 CIT at 236, 587 F. Supp. at 556; *see* 19 C.F.R. § 177.9(d)(2)(ii). Plaintiffs now ask the Court to reverse that ruling on the ground that the stipulation shows facts corresponding to the facts on which TAA No. 10 was originally based.

TAA No. 10 states in part:

> The tailors are responsible for all aspects of the production of the garments, including the purchase, for their own account, of the required fabrics from piece-good houses. The tailors then sell the completed garments to the distributors.

The stipulation includes these facts:

> The Master Tailor and Tailoring Workshops have no ownership interest in the Fabric.
>
> * * * * * * *
>
> The Fabric necessary to make the garment is either cut from the roll or bolts in the store of the Distributor or it is ordered by the Distributor for its account from a Fabric house for delivery to the Tailoring Workshop.

Since the facts set forth in TAA No. 10 include a sale of merchandise by the tailor and the stipulation of facts does not, the Court finds these factual circumstances are materially different and sustains the prior ruling by the Court.

Plaintiffs argue that Customs also based transaction value on a CMT charge in another Customs ruling, TAA No. 8. That ruling has no bearing in this case, however, since it does not involve the same merchandise and circumstances present here. *See* 19 C.F.R. § 177.9(b).

Plaintiffs also argue that CMT charges may be deemed "the price actually paid or payable for the merchandise" under section 1401a(b) in light of legislative history. They point to the following passage from the Statements of Administrative Action, H.R. Rep. No. 153, 96 Cong., 1st Sess. 442, at 442, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 705:

> In some cases, the price actually paid or payable may represent an amount for assembly of merchandise in which the seller has no interest in the merchandise other than as assembler. In such cases the price actually paid or payable, adjusted by the value of the components and required adjustments, will form the basis for the transaction value.

Plaintiffs contend that the CMT operation is similar to an assembly operation and therefore can be used to determine transaction value under section 1401a(b).

Customs regulations demonstrate that this case is not one where assembly costs may serve as the "price actually paid or payable" in determining transaction value. Transaction value generally is arrived at by determining the price paid for the goods when sold for exportation. 19 C.F.R. § 152.103(a). "In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation." *Id.* § 152.103(a)(1). The regulations provide another means of determining the price paid or payable when there is no actual sale of merchandise, but a sale of services:

> (3) *Assembled merchandise.* The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

19 C.F.R. § 152.103(a)(3). The regulation provides an example of when this subsection may apply:

> *Example 1.* The importer previously has supplied an unrelated foreign assembler with fabricated components ready for assembly having a value or cost at the assembler's plant of $1.00 per unit. The Importer pays the assembler 50 cents per unit for the assembly. The transaction value for the assembled unit is $1.50.

Since there is a sale of the exported merchandise between the Hong Kong distributor and American customers in this case, the price paid or payable is determined under subsection (1) of the regulation, and there is no reason to resort to subsection (3).

The requirement in section 1401a(b) that the sale used to determine transaction value be one "for exportation to the United States" also precludes plaintiffs' proposed valuation method. Since

the tailor deals only with the distributor, and "may or may not know the identity or address of the [c]ustomer," stipulation at 5, the Court holds that the transaction between tailor and distributor is not one "for exportation to the United States." *See Mitsui & Co., Ltd.* v. *United States,* 68 Cust. Ct. 266, 270 (1972) (merchandise not "for exportation to the United States" under former section 402(b) unless sold "in such a manner that the merchandise in question is irrevocably and undeniably, by reason of its nature and mode of handling, destined for export to the United States.")

Plaintiffs' reliance on *United States* v. *Getz Bros. & Co.,* 55 CCPA 11, C.A.D. 927 (1967) and *R.J. Saunders & Co.* v. *United States,* 42 CCPA 55, C.A.D. 570 (1954) is misplaced. Valuations in those cases, involving transactions between parties in the country of exportation, were based on sales of merchandise destined for exportation to the United States.

The Court holds that Customs correctly determined that the price paid by American customers for the imported merchandise constitutes transaction value under section 1401a. The action is dismissed. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 87–33)

BROOKSIDE VENEERS, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 81–9–01305

Before CARMAN, *Judge.*

[Defendant's motion for rehearing denied.]

(Decided March 26, 1987)

Stedina and Deem (Charles P. Deem on the motion) for the plaintiff.

Richard K. Willard; Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, U.S. Department of Justice, Civil Division, Commercial Litigation Branch *(Saul Davis* on the motion) for the defendant.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Defendant, United States, pursuant to Rule 59 of the Rules of this Court, moves for a rehearing of this Court's opinion and judgment in Slip Op. 86–142 of December 30, 1986. While the purpose of a rehearing is not to retry a case, if there has been a fundamental and significant flaw in the conduct of the original proceedings, Rule 59 provides a useful remedy. *See W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, C.R.D. 72–5 (1972).

Defendant contends the Court misconstrued the terms "log or flitch" as used but not defined in the Tariff Schedules of the United States (TSUS). The Court permitted oral argument of the motion to ensure clarity of the issues presented.

Defendant urges there is little or no case law defining the terms log or flitch. It claims the use of a reconstructed, artificial log or a

block of wood is not the same as a log or flitch in its natural state. Furthermore, to rule that a reconstructed log is a log or flitch might result in disassembling other provisions of the TSUS. Defendant asserts that should the Court uphold its earlier judgment, even Formica could be considered wood veneer.

Plaintiff contends that Congress did not define the words log or flitch. The Court should therefore look to the common and commercial meanings of the terms. Furthermore, urges plaintiff, it is incomprehensible that Congress could have intended its Brookline veneers to be treated as anything other than wood veneers under TSUS, item 240.06. Such a result would present an anomaly.

Flitch is defined as follows:

> **1a** *obs:* the side of any meat animal salted and cured **b:** a side of pork cured and smoked; *often:* the side meat of a hog after removal of shoulder loin, ham, and bones cured and smoked as bacon **c:** a strip or steak of fish (as halibut) suitable for or prepared by smoking **2a:** a longitudinal section of a log: as (1): an outer slab cut off in shaping a timber (2): a thick and often specially selected length of timber for further processing (as by cutting into veneer or turning) (3): a thick cut of timber with bark on one or more edges (4): a lengthwise half of a balk **b:** *a complete package of thin sheets of veneer laid together in sequence as they are sawed or sliced.* **3:** one of several elements (as planks or iron plates) that are secured together side by side to make a large girder or laminated beam

Webster's Third New International Dictionary 871 (1968) (emphasis added). The Wood Handbook further provides:

> *Flitch.*—A portion of a log sawed on two or more sides and intended for remanufacture into lumber or sliced or sawed veneer. The term is also applied to the resulting sheets of veneer laid together in sequence of cutting.

Forest Products Laboratory, Forest Service, U.S. Dep't. of Agriculture, Agriculture Handbook No. 72, Wood Handbook 482 (1955). The Court finds that where a log or flitch is essentially in its raw state, the veneers manufactured therefrom are properly classifiable as wood veneers under TSUS items 240.00—240.06.

Both plaintiff and defendant acknowledge that certain processing must occur before a tree can be processed into ordinary wood veneers. The tree must certainly be felled. It must be cut, and the logs or flitches resulting therefrom may be subject to steaming, cooking, and drying. The Court finds that the placing together of veneers or other types of flitches to secure a certain pattern, the gluing, and sometimes dyeing, by the plaintiff did not transform the resulting logs or flitches from their basic raw state. They are still logs or flitches. If processing of the logs or flitches advances further, the Court observes the raw material, i.e, the logs or flitches may reach a point where they will no longer be logs or flitches but rather some other intermediate or final product.

Since the defendant has failed to establish that there was a fundamental or significant flaw in the conduct of the original proceedings, defendant's motion for a rehearing, pursuant to Rule 59, is denied.

(Slip Op. 87–34)

UNITED STATES OF AMERICA, PLAINTIFF *v.* F.H. FENDERSON, INC., DEFENDANT

Court No. 84–07–01008

Before CARMAN, *Judge.*

[Joint motion for resolution of legal issues, granted, and this action, dismissed.]

(Decided March 26, 1987)

Richard K. Willard, Assistant Attorney General; David M. Cohen, Director, Department of Justice, Commercial Litigation Branch, Civil Division *(Platte B. Moring, III)* for plaintiff.

Doherty and Melahn (William E. Melahn) for defendant.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* The parties have submitted the following stipulation of facts and supporting documents, on the eve of trial, to assist the Court in resolving three legal issues. Both parties have also separately submitted their statement of issues which are essentially the same. The first issue presented is whether or not section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1980) (§ 1592), permits the Department of the Treasury, United States Customs Service (Customs) to assess the exporter of certain merchandise, Landry and Landry (1975) Ltd., (Landry) with one penalty and assess the customhouse broker as importer of record/nominal consignee, F.H. Fenderson, Inc., (Fenderson) with another penalty on the same merchandise. The second issue involves whether or not Customs' mitigation of penalty and settlement of its case against Landry pursuant to section 618 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1618 (1980), without reserving its rights to assert or continue the penalty claim against Fenderson discharges such claim. The final issue asks whether or not the voluntary tender of supplemental duties by Fenderson on behalf of Landry after both have received prepenalty notices constitutes a prior disclosure under § 1592(c)(4) and 19 C.F.R. § 162.74 (1981) when the District Customs officer did not refer the request to the Office of Investigations in accordance with 19 C.F.R. § 162.74(b).

UNCONTROVERTED FACTS

The following facts have been stipulated to by both parties: From approximately May 1981, to and including September 1981, the defendant, F.H. Fenderson, Inc., a customhouse broker, as importer of record/nominal consignee, entered, introduced, or caused to enter

or introduce merchandise (crabmeat) from Canada into the Commerce of the United States at the Port of Calais, Maine under cover of the following seven consumption entries on behalf of Landry, the Canadian exporter:

Entry Number	*Date of Entry*
163092	5/22/81
163178	6/1/81
163224	6/4/81
163431	6/25/81
163458	6/29/81
164011	8/28/81
164269	9/24/81

On each of the pro forma invoices accompanying the seven entries in question, Landry certified the "currency of value" was Canadian. On each of the Special Customs invoices accompanying the entries in question, (Entry No. 163431 had no Special Customs invoice), Landry stated the invoice price for the merchandise involved and certified Canadian currency was used. Fenderson, as importer of record/nominal consignee, filed the seven consumption entries in question with Portland Customs on behalf of Landry utilizing the invoice documents prepared by Landry and converted the invoiced amount on each of the consumption entries from the Canadian dollar amount certified by Landry in the invoices to an equivalent amount in United States dollars.

On September 30, 1981, the District Director of Customs at Portland, Maine (District Director) issued a prepenalty notice to Landry covering the seven entries which are at issue in this case and five subsequent consumption entries for crabmeat filed by Fenderson on behalf of Landry with Portland Customs. The District Director also issued, on the same day, a prepenalty notice to Fenderson, covering the seven consumption entries. The District Director did not refer either the Fenderson or Landry penalty cases to the Customs Office of Investigations.

On October 21, 1981 Mr. Edgar G. Cook of Fenderson sent a letter to the District Director in reference to the prepenalty notice issued to Landry and enclosed a check drawn on a Canadian bank from Landry in the amount of $1,657.73 for the potential loss of revenue incurred from the difference in United States and Canadian dollar amounts stated with the consumption entries. The check was returned to Mr. Cook by the Assistant District Director of Customs in Portland (Assistant District Director) on October 23, 1981 because it was drawn on a Canadian bank and was deemed non-negotiable in United States funds.

On October 26, 1981, Mr. Cook of Fenderson sent a letter to the District Director in reference to the prepenalty notice issued to Fenderson admitting that it had, indeed, filed entries with incorrect dutiable value but contended it had no knowledge at the time of the entry the value was incorrect. Government Exhibit no. 8. The letter

also referred to the entries enumerated in the prepenalty notice and included a full discussion of its interpretation of the facts and circumstances surrounding the violation.

On November 3, 1981, Mr. Cook of Fenderson, sent a letter to the District Director with an enclosed check for $1,657.73, representing a voluntary tender of the supplemental duties on the entries covered by the Landry prepenalty notice. A receipt was issued by Customs on November 5, 1981 which stated "Acct. Class Code 72, Voluntary Tender of Supplemental Duties." Customs did not treat the voluntary tender as a prior disclosure.

On November 4, 1981 the Assistant District Director issued a penalty notice to Landry in the amount of $6,630.92. Counsel for Landry submitted a petition for mitigation of the Landry penalty to the District Director by letter dated November 24, 1981. A decision letter was sent on January 18, 1982 from the District Director to Landry mitigating the Landry penalty to $3,315.46. This amount was forwarded to the District Director by Mr. Cook on behalf of Landry by memoranda dated March 4, 1982 and was accepted by Customs which issued a receipt on March 4, 1982 stating "Acct. Class Code 32, Payment of Mitigated Penalty." At the time of this acceptance, Customs did not reserve its rights to assert or continue the penalty claim against Fenderson.

On November 6, 1981, the Assistant District Director also issued a penalty notice to Fenderson in the amount of $1,668.16. Mr. Robert T. Fenderson of Fenderson submitted a petition for remission of the Fenderson penalty to the District Director on January 3, 1982. On January 11, 1982, the District Director sent a decision letter to Mr. Fenderson mitigating the Fenderson penalty to $250.00. Mr. Fenderson responded with a supplemental petition concerning the Fenderson penalty on February 7, 1982, appealing the decision of the District Director on Fenderson's first petition for remission and requesting review by the Regional Commissioner for a waiver of the penalty. On February 23, 1982, the District Director sent a letter to Mr. Fenderson concerning Fenderson's request for documents referenced in the supplemental petition, enclosing certain documents requested. On February 9, 1983, the Regional Commissioner of Customs in Boston, Massachusetts sent a decision letter on Fenderson's supplemental petition to the District Director. The decision letter of the Regional Commissioner was forwarded to Fenderson by the District Director on February 18, 1983. The decision letter recognized the facts of the case and the mitigation of the penalty to $250.00 due to Fenderson's lack of financial benefit from the insufficient deposited duties, and affirmed the decision of the District Director that Fenderson was at least negligent in its actions.

BACKGROUND

On December 10, 1985, Plaintiff Government (Government) moved for summary judgment in this case on the grounds the alle-

gations set forth in the complaint amounted to negligence *per se* and there were no genuine issues as to any material fact. On March 5, 1986, Defendant Fenderson responded to Government's motion for summary judgment alleging there was, indeed, a dispute as to some material facts on the negligence claim. On the same day, Fenderson also filed a cross motion for summary judgment raising four legal issues and asserting there existed no genuine issues as to any material fact. On April 9, 1986, Government responded to Fenderson's cross motion for summary judgment and maintained there were no genuine issues as to any material fact in the action. Both parties filed supplemental briefs.

On December 5, 1986, this Court issued a decision denying both motions for summary judgment. *United States* v. *F.H. Fenderson, Inc.*, —— CIT ——, Slip Op. 86–126 (December 5, 1986). On January 30, 1987, this Court entered an order designating the time, date, and place of trial.

Counsel for both parties now come before this Court with a joint motion for the resolution of legal issues prior to trial. It is in the interest of a just, speedy, and inexpensive determination of this action that both parties have consulted and prepared a stipulation of facts and submitted the same with this motion on March 16, 1987. Trial is set for April 27, 1987 in Portland, Maine.

DISCUSSION

A motion by both parties for judgment rendered upon certain issues in controversy in this case has been filed pursuant to Rule 1 and 56(c) of the Rules of this Court. The first issue before the Court is whether or not § 1592 permits Customs to assess the exporter of certain merchandise with one penalty and assess Fenderson, the customhouse broker acting as importer of record/nominal consignee with another penalty on the same merchandise. This is substantially the form in which Government presented the issue. Fenderson has penned this issue in a different but significant way: "[w]hether 19 U.S.C. Sec. 1592 permits Customs to assess multiple penalties for the same alleged violation?" Defendant's submitted issues filed March 16, 1987. Both issues will be addressed.

Duty enforcement penalties are set out in § 1592,[1] which "provides penalties for fraudulent, grossly negligent and negligent acts

[1] Section 1592 provides in relevant part:

(a) Prohibition.—
(1) General rule.—Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, written or oral statement, or act which is material and false, or
(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception.—Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

* * * * * * *

(c) Maximum penalties.—
(1) Fraud.—A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.

Continued

committed during the importation of merchandise into the United States, procedures for imposing such penalties, and *de novo* review of such penalty claims in the Court of International Trade." *United States* v. *Priority Products, Inc.*, —— CIT ——, 615 F. Supp. 591, 592 (1985).

Specifically, § 1592(a)(1), provides "no person" may, by fraud, gross negligence, or negligence, deprive the United States of lawful duties. Section 1592(c) establishes the amount of the civil penalty as punishment for each specific and distinct violation enumerated in subsection (a), paragraph (1). In subsection (c), "the penalty imposed * * * differs with the degree of scienter or culpability of the defendant." *United States* v. *Gordon*, —— CIT ——, 634 F. Supp 409, 414–15 (1986). There are three separate categories of assessments for penalties depending on whether or not the violation has been committed by fraud, gross negligence or negligence.

Fenderson argues the assessment of penalties against Landry and itself is contrary to the statute in that the assessment is an imposition of multiple penalties for one violation. Government contends there were two distinct violations committed by Landry and Fenderson; these violations were different in substance as well as in culpability even though they were committed on the same consumption entries. This Court refers to the various documents transmitted between the parties.

The penalty notice issued by Customs on November 6, 1981 to F. H. Fenderson included the following:

> 3. Laws and Regulations Violated:
>
> Title 19, U.S. Code, Sections 1484, 1485, and 1592. Sections 141.86 and 143.13, Customs Regulations (Title 19, CFR, 141.86 and 143.13).
>
> 4. Facts Establishing the Violation:
>
> F. H. Fenderson, Inc. as agent for Landry & Landry (1975) Ltd., filed the entries enumerated under Item 2 above with an incorrect dutiable value. Invoices submitted with the entries stated the transaction was in Canadian currency. The payment for the merchandise was actually in United States dollars. By converting the invoiced amount to United States dollars, the net entered value (dutiable value) was improperly reduced.

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(2) Gross negligence.—A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or
(ii) four times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence.—A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or
(ii) two times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

19 U.S.C. § 1592(a), (c) (1980).

The prepenalty notice issued on September 30, 1981 and the penalty notice[2] issued on November 4, 1981 by Customs to Landry included the following:

> 3. Laws and Regulations Violated:
>
> Title 19, U.S. Code, Sections 1484, 1485 and 1592. Sections 141.86 and 143.13 Customs Regulations. (Title 19 CFR 141.86 and 143.13.)
>
> 4. Facts Establishing the Violation:
>
> Landry & Landry (1975) Ltd. shipped crabmeat to the United States and presented false invoices to the U.S. Customs Service. The invoices set forth that the transaction between the shipper and the consignee involved Canadian currency. Documentation in the files establishes that the United States consignees made payment in United States dollars. By stating that the invoice values were in Canadian currency, the dutiable value was reduced because of the difference in value between Canadian and United States dollars. The false statement as to type of currency deprived the United States of duty lawfully due.

Fenderson's letter in response to a prepenalty notice sent by Customs on September 30, 1981 states the following: "We agree at this time that [the facts establishing the violation] of the notice appears to be correct, that we did file entries with the incorrect dutiable value."[3]

The statute in question on this issue specifies: "no person * * * may enter * * * merchandise into the commerce of the United States by means of any document * * * or act which is material and false, or * * * may aid or abet any other person to violate [the above]." 19 U.S.C. 1592(a)(1). The documents sent to Landry from Customs alleged the gross negligent act of presenting invoices containing false statements which constituted a violation. The documents sent to Fenderson from Customs alleged the negligent act of filing entries with incorrect dutiable value which constituted a violation. Both violations alleged were the result of separate and distinct acts committed by separate and distinct parties constituting separate and distinct violations.

It is true Customs may not assess multiple penalties for the same violation. The resultant amount could conceivably far outreach that

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[2] The November 4, 1981 penalty notice stated the following:

> There are no changes in the information concerning the violation which is set forth in the Prepenalty Notice and Prepenalty Statement of September 30, 1981. Copies of the Prepenalty Notice and Prepenalty Statement are attached hereto as Exhibits A and B and are made a part hereof.

[3] The Fenderson prepenalty notice's "Facts" paragraph was essentially the same as the "Facts" paragraph in the Fenderson penalty notice. It stated:

4. Facts Establishing the Violation:

> F. H. Fenderson, Inc., as agent for Landry & Landry (1975) Ltd., filed the entries enumerated under Item 2 above with an incorrect dutiable value. Invoices submitted with the entries stated the transaction was in Canadian currency. The payment for the merchandise was actually in United States dollars. By converting the invoiced amount to United States dollars, the net entered value (dutiable value) was improperly reduced.

of the value of the merchandise entered[4] and run contrary to the congressional intent behind the amending of § 1592 in 1978.[5]

Fenderson is correct in stating Customs may not assess multiple penalties for a single violation; but in the present situation it appears there could be two separate violations.[6] Government is correct in asserting Customs is permitted under § 1592 to assess separate penalties for separate violations on the same merchandise. Therefore, the Court holds Government may endeavor to assess Landry and Fenderson separate penalties for separate violations, assuming, of course, the facts support such an endeavor.

The second issue before this Court is whether or not Customs' settlement of its penalty case against Landry discharges Customs' claim against Fenderson. Customs settled its case against Landry after receiving Landry's petition for remission of the penalty, mitigating the Landry penalty pursuant to 19 U.S.C. § 1618, and collecting the penalty. Fenderson contends this constituted a complete release of any further responsibility on the part of all potential persons concerned in the case. Because Customs, Fenderson argues, settled its penalty case with the actual "wrongdoer" Landry, it is precluded from seeking additional penalties against the defendant. This argument appears to be predicated upon the belief there was only one violation, and therefore only one claim should be assessed in satisfaction of the penalty to be paid on account of that violation.

Government states Customs issued separate prepenalty notices to Landry and Fenderson establishing causes of action on different violations committed by different violators. These notices did not hold Fenderson and Landry jointly and severally liable for the violation of § 1592. Customs treated the cases separately receiving separate petitions for mitigation from Fenderson and counsel for Landry. This Court agrees. When Customs mitigated and settled its case against Landry, the payment by Landry for its gross negligence violation did not terminate any cause of action Customs had against Fenderson for the alleged negligence. There was no "release" of Customs' case against Fenderson and there was no need to reserve any right to enforce this matter.

The final issue before this Court is whether or not the voluntary tender of supplemental duties by Fenderson on behalf of Landry after both have received prepenalty notices constitutes a prior disclosure under § 1592(c)(4) and 19 C.F.R. § 162.74, when the District

[4] An example of such a situation could exist where a partnership of 30 individuals is determined by Customs to have committed a single negligent violation. Allowing Customs to assess 30 multiple penalties upon 30 individuals for a single negligent violation would end in too severe a result.

[5] It has been observed by this Court:

> [t]he legislative history makes clear that an important motivation for amending section 1592 [in 1978] was Congress' desire to alleviate the harsh consequences of the forfeiture penalty. The Senate report notes that a problem with the former section 1592 was that once having found a violation, the courts had no alternative but to order forfeiture. This penalty was thought too severe in many cases. S. Rep. No. 778 at 2, 1978 U.S. Code Cong. & Ad. News at 2213. Thus, the trier of fact may award penalties in an amount far below the maximum allowable, presumably based on any rational reason including the degree of damages sustained. By replacing forfeiture with varying monetary penalties, which are subject to reduction by the trier of fact and which, to varying degrees, will relate to damages, Congress has made section 1592 largely remedial, rather than "punitive," both in "purpose" and "effect."

Gordon, 634 F. Supp. at 415–416 (footnote omitted).

[6] This is not a foreign concept in the law. Where enforcement statutes are enacted concerning whether or not criminal or civil penalties are to be assessed, it is common to hold violators severally responsible although the degree of responsibility is often less for one violator than for another.

Customs officer did not refer the request to the Office of Investigations in accordance with 19 C.F.R. § 162.74(b).

Section 1592(c)(4) states in pertinent part:

> **Prior disclosure.**—If the person concerned discloses the circumstances of a violation of subsection (a) of this section *before*, or without knowledge of, *the commencement of a formal investigation of such violation*, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed—
>
> * * * * * * *
>
> (B) if such violation resulted from negligence or gross negligence, the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26) on the amount of lawful duties of which the United States is or may be deprived *so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure* or within 30 days, or such longer period as the appropriate customs officer may provide, *after notice by the appropriate customs officer of his calculation of such unpaid amount.*
>
> The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

19 U.S.C. § 1592(c)(4) (emphasis added).

The statute states prior disclosure occurs when a person involved with the violation in question discloses the circumstances "before * * * the commencement of a formal investigation of such violation." 19 U.S.C. § 1592(c)(4). When a formal investigation is considered to be commenced is set forth in 19 C.F.R. § 162.74(c), which states in pertinent part:

> *Commencement of formal investigation.* A formal investigation is considered to be commenced:
>
> (1) In the case of a referral by an import specialist or other Customs officer of a matter involving the disclosing party and the disclosed information for investigation of a possible violation of 19 U.S.C. 1592, on the date the matter was referred to the Office of Investigations;
>
> (2) In the case of referral by an import specialist or other Customs officer of a request for value, classification or other technical investigation, on the date recorded in writing by an investigating agent as the date on which discovered facts and circumstances which caused him to believe that the possibility of a violation of 19 U.S.C. 1592 existed with respect to the disclosing party and the disclosed information;
>
> * * * * * * *
>
> (6) In all other cases, on the date recorded in a Report of Investigation, Customs Form 23, as the date on which an investigator was assigned to investigate possible violations of 19

U.S.C. 1592 by the disclosing party with respect to the disclosed information.

19 C.F.R. § 162.74(c)(1),(2),(6).

When a referral occurs is also set forth in 19 C.F.R. § 162.74(b), which states: *"Referral for investigation.* Any disclosure of a violation shall be referred immediately by the district director to the appropriate field office of the Office of Investigations. Upon completion of its investigation, the field office immediately shall return the disclosure, together with its report, to the district director for appropriate action." 19 C.F.R. § 167.74(b).

It is clear, under the instant circumstances involved and at the time of the events in 1981, a formal investigation is said to commence when the disclosure of the violation is referred immediately to a Customs investigation agent of the appropriate field office of the Office of Investigations and certain actions or events occur pursuant to the regulations. If that has not happened, which the agreed statement of facts establishes, then a formal investigation has not commenced. The District Director did not refer the request to the Office of Investigations and therefore failed to follow its own regulations to insure the commencement of a formal investigation would be established before a prior disclosure. Therefore, any prior disclosure made, pursuant to the statute and the regulations, should be acknowledged if received before this event.

This final issue before the Court focuses in on whether Fenderson's tender of supplemental duties on behalf of Landry constitutes a prior disclosure. A prior disclosure is one that discloses the circumstances of a violation by the person concerned in the violation within the time frame as discussed above. 19 C.F.R. § 162.74(a). Fenderson's letter of October 21, 1981, accompanying the supplemental tender, refers to the prepenalty notice issued to Landry and states "we enclose * * * a check for duties that apparently should have been paid on entries involved in the notice." Government's Exhibit no. 5. The letter also refers to the facts surrounding the "alleged" gross negligent act and expresses doubt as to the wrongfulness of the act. The letter concludes: "At any rate * * * enclosed [is] a check for the Potential [sic] loss of revenue * * *." *Id.* This Court holds such a letter and tender of supplemental duties submitted by Fenderson on behalf of Landy does "disclose the circumstances of [the Landry] violation of [§ 1592]" and therefore constitutes a prior disclosure. *See* 19 C.F.R. § 162.74(a).

Fenderson also sent a letter to the District Director on October 26, 1981 admitting that it had, indeed, filed entries with incorrect dutiable value but contended it had no knowledge at the time of the entry the value was incorrect. Government Exhibit no. 8. The letter also referred to the entries enumerated in the prepenalty notice and included a full discussion of its interpretation of the facts and circumstances surrounding the violation. On November 3, 1981, Fenderson voluntarily tendered a check in the amount stated as a

supplemental deposit of estimated duties on the entries in question and listed the entries with each estimated duty. Customs received this check and issued a receipt of voluntary tender of supplemental duties on November 5, 1981, prior to the issuance of its penalty notice to Fenderson on November 6, 1981. This is a sufficient prior disclosure by Fenderson of circumstances involving the Fenderson violation.

CONCLUSION

For the reasons stated, the joint motion for the resolution of legal issues prior to trial has been granted and the conclusions as to each issue decided shall be entered accordingly. Since this Court has held there was a prior disclosure of the violation by Fenderson and a tender of actual loss of duties within the specified time period pursuant to § 1592(c)(4)(b) and 19 C.F.R. § 162.74(c); and since this determination ultimately settles the disposition of this matter; and since any interest that might be due on the duties paid appear *de minimis,* this action is dismissed.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSE
				Item No. and
C87/36	DiCarlo, J. March 16, 1987	Zayre Corp.	84–2–00240	Item 379.95 or 27.5%
C87/37	Newman, S.J. March 18, 1987	Nissho-Iwai American Corp.	81–7–00990, etc.	Item 610.80 11% or 10.2%
C87/38	Restani, J. March 19, 1987	Tomy Corp.	86–1–00037	Item 737.95 12.3% or 13.6
C87/39	Newman, S.J. March 20, 1987	Elbe Product Corp.	85–5–00680, etc.	Item 355.25 6.2%, 13.8% per lb. Item 355.65 6.9%, 7.4%, 8 Item 356.40 13.8% + 10¢ lb. Item 774.55 7.7%
C87/40	Carman, J. March 25, 1987	Paper Corp.	84–3–00362	Item 254.46 5.4%

SIFICATION DECISIONS

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
d rate	Item No. and rate		
r 383.90	Item 376.56 15%, 13.5%	Izod Outerwear v. U.S., S.O. 84–72 and Pacific Trail Sportswear v. U.S., 5 CIT 206 (1983)	Savannah Jackets, snowsuits, coats, ski pants or vests
2%	Item 664.05 5%, 4.7%, 4.4% or 4.1%	Nissho-Iwai American Corp. v. U.S., 602 F. Supp. 88, *aff'd*, 3 Fed. Cir. 174 (1985)	Seattle Tool joints
1.6%	Item 734.20 4.7% or 5.1%	Agreed statement of facts	Los Angeles Games
% + 6¢	Item 771.42 or 771.43 4.9%, 5.1%, 5.3%, 5.6%, 5.8%, or 6%	U.S. v. Elbe Products Corp., C.A.D. 1267 (1961)	New York Artificial leather, synthetic leather, coated fabrics, etc.
8.5%			
¢ per			
	Item 254.80 2.4%	Agreed statement of facts	Champlain/Rouses Pt. Mark I Perma strip

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Ite
C87/41	Newman, S.J. March 30, 1987	Coburn Optical Industries	84–3–00379, etc.	Item 709.05 21.3% or 19.4% or 17.5% for laser photocoagulators including slitlamps	Item ph Item eli Valu ph 88 ap va 12 ap

ECISIONS — Continued

HELD tem No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
m 709.15 for laser photocoagulator m 709.05 for slitlamp lue of laser photocoagulator is 8% of the ppraised value; alue of slitlamp is 2% of the ppraised value	Agreed statement of facts	Los Angeles Tulsa Tampa Laser photocoagulator and sliplamps

ABSTRACTED

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS VALUA
V87/28	DiCarlo, J. March 16, 1987	Mitsubishi International Corp.	83–3–00363	American sell items mark "B"
V87/29	Newman, S.J. March 16, 1987	Import Associates	85–6–00791–S	Transaction v
V87/30	Watson, J. March 24, 1987	Amicale Yarns, Inc.	290974A, etc.	Export value
V87/31	Watson, J. March 24, 1987	Benj. Wolf Co.	229488A, etc.	Export value
V87/32	Watson, J. March 24, 1987	George E. Bardwill & Sons	291079A, etc.	Export value
V87/33	Watson, J. March 24, 1987	H. W. Robinson & Co.	268823 A, etc.	Export value

D VALUATION DECISIONS

IS OF ATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
lling price, ked "A" and	Appraised values less 22%, per pair, for items marked "A" Duty refund of $3,343.34, $2,911.54, and $870.85 for items marked "B"	Agreed statement of facts	Savannah Footwear
value	Value is equivalent to the Czechoslovakian border price of the merchandise, pkd., or the f.o.b. Hamburg price, less freight and insurance, pkd, with no value advance for interest charges	Agreed statement of facts	Baltimore Lead crystal glassware
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Knitting yarn
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Scarves
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Table cloths and napkins
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Flatware

ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V87/34	Watson, J. March 24, 1987	Marubeni Co.	252201A, etc.	Export value
V87/35	Watson, J. March 24, 1987	S. Shamash & Sons	244002A, etc.	Export value
V87/36	Watson, J. March 24, 1987	S. Shamash & Sons	266030A, etc.	Export value
V87/37	Re, C.J. March 25, 1987	Puma USA, Inc.	83-9-01328	Transaction value
V87/38	Watson, J. March 25, 1987	George E. Bardwill & Sons	R58/14317	Export value
V87/39	Watson, J. March 25, 1987	Gimbel Bros. Inc.	R58/4197, etc.	Export value
V87/40	Watson, J. March 25, 1987	Mid America Seaway Corp.	R58/22439, etc.	Export value
V87/41	Watson, J. March 25, 1987	Mid America Seaway Corp.	R59/5104, etc.	Export value
V87/42	Watson, J. March 25, 1987	Novelty Veiling Co.	R58/26992, etc.	Export value
V87/43	Watson, J. March 25, 1987	Novelty Veiling Co.	R59/8333	Export value

N DECISIONS — Continued

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton fabrics
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Silk fabrics
	Invoiced prices paid to Centrotextil of Yugoslavia plus additions for packing	Agreed statement of facts	Savannah Men's basketball shoes
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Tableware
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Binoculars
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Scarves
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Scarves

V87/44	Watson, J. March 25, 1987	S. Shamash & Sons	R58/4944, etc.	Export value	
V87/45	Watson, J. March 26, 1987	G. C. Murphy Co.	R60/2767	Export values for items marked "A" and "B"	
V87/46	Watson, J. March 26, 1987	G. C. Murphy Co.	R62/12526	Export value	
V87/47	Watson, J. March 26, 1987	George E. Bardwil & Sons	R63/1739, etc.	Export value	
V87/48	Watson, J. March 26, 1987	Hazen Mercantile Co.	R66/1830, etc.	Export value	
V87/49	Watson, J. March 26, 1987	Imperial International Corp.	R61/6215	Export value	
V87/50	Watson, J. March 26, 1987	Mersco Textile Co.	R60/7863	Export value	
V87/51	Watson, J. March 26, 1987	Novelty Veiling Co.	294884, etc.	Export value	
V87/52	Watson, J. March 26, 1987	S. Shamash & Sons	R58/4940, etc.	Export value	
V87/53	Watson, J. March 26, 1987	S. Shamash & Sons	R61/1127, etc.	Export value	

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Piece goods
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values, items marked "A"; appraised values less 7.5% thereof, items marked "B"	Agreed statement of facts	New York Gloves and porcelain dinnerware
Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Table goods
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Tableware
Equal to appraised values, less 7.5%, net pkd.	Agreed statement of facts	New York Transistor radios
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Seattle Hook rugs
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Scarves
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Piece goods, etc.
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabric

Appeals to the U.S. Court of Appeals for the Federal Circuit

American Permac, Inc. v. United States, 10 CIT ——, Slip Op. 86–120, *appeal docketed,* No. 87–1159 (Fed. Cir. Jan. 21, 1987).

National Corn Growers Ass'n v. Baker, 10 CIT ——, Slip Op. 86–55, *appeal docketed,* No. 87–1160 (Fed. Cir. Jan. 22, 1987).

Mast Industries, Inc. v. United States, 11 CIT ——, Slip Op. 87–8, *appeal docketed,* No. 87–1182 (Fed. Cir. Feb. 6, 1987).

E.C. McAfee v. United States, 10 CIT ——, Slip Op. 86–135, *appeal docketed,* No. 87–1209 (Fed. Cir. Feb. 25, 1987).

A.N. Deringer v. United States, 10 CIT ——, Slip Op. 86–134, *appeal docketed,* No. 87–1213 (Fed. Cir. March 3, 1987).

Toshiba Corp. v. United States, 11 CIT ——, Slip Op. 87–23, *appeal docketed,* No. 87–1253 (Fed. Cir. March 24, 1987).

Sharp Corp. v. United States, Ct. No. 86–10–01299 (March 6, 1987), *appeal docketed,* No. 87–1252 (Fed. Cir. March 24, 1987).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Ceramica Regiomontana, S.A. v. United States, 10 CIT ——, 636 F. Supp. 961, *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987).

ICC Industries, Inc. v. United States, 10 CIT ——, 632 F. Supp. 36, *aff'd,* No. 86–1201 (Fed. Cir. Feb. 11, 1987).

Heraeus-Amersil, Inc. v. United States, 10 CIT ——, Slip Op. 86–34, *aff'd,* No. 86–1526 (Fed. Cir. Feb. 26, 1987).

Kelley v. Secretary, U.S. Dept. of Labor, 10 CIT ——, Slip Op. 86–66, *rev'd, vacated & remanded,* No. 86–1650 (Fed. Cir. Feb. 26, 1987).

National Corn Growers Ass'n v. United States, 10 CIT ——, Slip Op. 86–127, *aff'd,* No. 87–1118 (Fed. Cir. April 1, 1987).

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